AMERICAN RACIAL JUSTICE ON TRIAL — AGAIN: AFRICAN AMERICAN REPARATIONS, HUMAN RIGHTS, AND THE WAR ON TERROR

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Few questions challenge us to consider 380 years of history all at once, to tunnel inside our souls to discover what we truly believe about race and equality and the value of human suffering.

— Kevin Merida[1]
(on African American reparations)

Secretary of State Colin L. Powell said today that terrorists can only be attacked from "the highest moral plan" and that there is no contradiction between the Bush Administration's war on terrorism and a continuing U.S. commitment to human rights.

— Karen DeYoung[2]

I. INTRODUCTION

Much has been written recently on African American reparations[3] and reparations movements worldwide,[4] both in the popular press and

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1. Kevin Merida, *Did Freedom Alone Pay a Nation's Debt?*, WASH. POST, Nov. 23, 1999, at C1.

2. Karen DeYoung, *Powell Says U.S. Can Balance Human Rights, War on Terror*, WASH. POST, Aug. 2, 2002, at A20 (describing U.S. Secretary of State Colin Powell's affirmation of U.S. commitment to human rights in its "war on terrorism").

3. *See generally* John F. Harris, *Clinton Says U.S. Wronged Africa; President Cites Slavery, "Neglect,"* WASH. POST, Mar. 25, 1998, at A1 (explaining that many African American leaders feel an apology is an empty gesture); Lori S. Robinson, *Growing Movement Seeks Reparations for U.S. Blacks*, ARIZ. REPUBLIC (Phoenix), June 22, 1997, at H1; *Politicians, Scholars Voice Support for Slavery Reparations*, JET, May 15, 2000, at 4 (describing how several city councils adopted resolutions urging Congress to consider proposals for African American reparations).

scholarly publications. Indeed, the expanding volume of writing underscores the impact on the public psyche of movements for reparations for historic injustice.

Some of that writing has highlighted the legal obstacles faced by proponents of reparations lawsuits, particularly a judicial system that focuses on individual (and not group-based) claims and tends to squeeze even major social controversies into the narrow litigative paradigm of a two-person auto collision (requiring proof of standing, duty, breach, causation, and direct injury).[5] Other writings detail the new research uncovering business and public institutional profiteering on the slave economy — banks, railroads, insurers, and universities.[6] Still other studies document African American social conditions and the persistence of subtle yet invidious discrimination against people of color and especially African Americans.[7] Our Essay does not retrace this terrain. Nor does it offer an in-depth study of reparations dynamics in specific cases.

Rather the Essay examines the ongoing and impending African American reparations suits and frames in larger terms what may well be at stake in this forthcoming epochal trial of American Racial Justice. In particular, the Essay draws linkages among African American redress claims, the United States' approach to international human rights and America's moral authority to fight its preemptive "war on Terror." Drawing upon and extending Professor Derrick Bell's interest-convergence thesis[8] and Professor Mary Dudziak's

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4. *See generally* Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001) (reparations suit filed on behalf of former sex slaves during World War II); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 484 n.22 (1988) [hereinafter Yamamoto, *Racial Reparations*] (describing individual reparative payments made to Native American tribes); Jennifer Peter, *Germany Pays Nazis' Wartime Slave $4,454 in Reparations*, WICHITA EAGLE, Feb. 24, 2002, at 6A (noting that the German reparations program will ultimately distribute $5 billion to Holocaust survivors).

5. Yamamoto, *Racial Reparations*, *supra* note 4, at 488 (critiquing the inapt fit of the narrow traditional legal paradigm).

6. *See Second Slave Reparations Suit Filed*, FOX NEWS, May 2, 2002, *at* http://www.foxnews.com/story/0,2933,51723,00.html (detailing a lawsuit filed by Richard E. Barber, Jr. against Norfolk Southern Railroad, New York Life Insurance, and a private bank alleging that they all benefited and profited from slave labor); *see also* James Cox, *Activists Challenge Corporations That They Say Are Tied to Slavery*, USA TODAY, Feb. 21, 2002, at 1A [hereinafter Cox, *Activists Challenge Corporations*] (explaining that the corporations owned, rented, or insured slaves), *available at* http://www.usatoday.com/money/general/2002/02/21/slave-reparations.htm; James Cox, *Insurance Firms Issued Slave Policies*, USA TODAY, Feb. 21, 2002, at 9A, *available at* http://www.usatoday.com/money/general/2002/02/21/slave-insurance-policies.htm.

7. *See generally* W.E.B. DUBOIS, SOME EFFORTS OF AMERICAN NEGROES FOR THEIR OWN SOCIAL BETTERMENT (1898) (documenting African American social conditions and the persistence of subtle yet invidious discrimination against people of color).

8. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*]; *see also infra* Section IV.C.2.

ensuing research[9] into the international underpinnings of *Brown v. Board of Education*,[10] the Essay offers insights into what the future *might be*, here and in the eyes of worldwide communities, depending on what choices we in America make about African American justice claims and human rights.

II. EPOCHAL RACE TRIALS: THE JAPANESE AMERICAN INTERNMENT AND AFRICAN AMERICAN SLAVERY

In the *Myth of Sisyphus*,[11] Albert Camus describes Sisyphus as a man whose life is a recurring trial. Sisyphus is charged with the immense task of rolling a giant rock up a steep hill. He struggles, not sure he will succeed. When, after great effort, he finally pushes the rock to the crest, it crashes back down. And Sisyphus starts over again. Yet Camus, a novelist and French resistor of the Nazis, tells us not to despair. Sisyphus's awareness of his recurring trial, the passionate effort he nevertheless dedicates each time, and the progress, albeit momentary, he achieves give genuine meaning to his life's struggle.

So it is with American Racial Justice. Since the United States' inception, racial injustice has marked the American landscape — along with efforts to rectify it. Both are American recurring traditions. And law is often central to racial subordination and sometimes crucial, although less often, to liberation. That injustice repeats is not itself reason to despair. The key, as Camus suggests, lies in how we struggle with each trial.

American society now faces two recurring trials of racial justice. These are epochal race cases.[12] The Bush administration's war on terror is effectively retrying the World War II Japanese American internment case, *Korematsu v. United States*,[13] and the national security and civil-liberty tension it embodies. That case, described briefly below, has already once been retried in 1984[14] because of the

9. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) [hereinafter DUDZIAK, COLD WAR CIVIL RIGHTS].

10. 347 U.S. 483 (1954).

11. ALBERT CAMUS, THE MYTH OF SISYPHUS (Justin O'Brian trans., Hamish Hamilton 3d ed. 1961) (1955) (reframing and interpreting in existential terms the Greek myth of the Corinthian King whose sentence in Hades was to forever roll a giant stone up a hill).

12. For a description of "epochal race cases," see *infra* notes 66-74 and accompanying text.

13. 323 U.S. 214 (1944). *See generally* Eric K. Yamamoto, *Korematsu Revisited — Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986) [hereinafter Yamamoto, *Korematsu Revisited*] (addressing the problem of lax judicial review of excessive national security measures that curtail civil liberties).

14. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *see infra* Section II.A.

belated discovery of egregious Justice and War Department misconduct in the original case in falsifying the military-necessity basis for the internment. That retrial provided a legal foundation for Japanese American reparations.[15] Now, it appears, some in government are seeking to resurrect the "old" *Korematsu* to justify the Bush administration's present-day national security curtailment of civil liberties.[16]

The other impending, and related, epochal race trial grows out of the African American reparations suits recently filed and soon to be filed in American courts.[17] With the *Korematsu* "retrial" as a backdrop, those reparations suits are the focus of this Essay. Collectively, the suits seek not only to recover damages for African American descendants of slaves, but also to create historic fact-finding commissions and education/health/housing trust funds for African Americans most in need.[18] Equally important, as in the *Korematsu* case, the suits will likely display how the United States handles the deep injustices it visits on its own people. Because courts are sites of "cultural performances"[19] in controversial cases, the reparations suits promise to reshape the way the American public and countries worldwide view American racial justice.

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15. *See infra* Section II.A.

16. *See infra* Section II.A.

17. There have been ten cases filed in federal district courts, including Wyatt-Kervin v. J.P. Morgan Chase, No. 03-36 (S.D. Tex. filed Jan. 21, 2003), *available at* http://www.pacer.psc.uscourts.gov; Hurdle v. FleetBoston Fin. Corp., No. 02-4653 (N.D. Cal. filed Sept. 25, 2002), *available at* http://www.pacer.psc.uscourts.gov; Johnson v. Aetna Life Ins. Co., No. 02-2712 (E.D. La. filed Sept. 3, 2002), *available at* http://www.pacer.psc.uscourts.gov; Bankhead v. Lloyd's of London, No. 02-6966 (S.D.N.Y. filed Sept. 3, 2002), *available at* http://www.pacer.psc.uscourts.gov; Porter v. Lloyd's of London, No. 02C-6180 (N.D. Ill. filed Aug. 29, 2002), *available at* http://www.pacer.psc.uscourts.gov; Barber v. FleetBoston Fin. Corp., No. 02-2084 (D.N.J. filed May 1, 2002), *available at* http://www.pacer.psc.uscourts.gov; Farmer-Paellman v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov; Carrington v. FleetBoston Fin. Corp., No. CV-02-1863 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov; and Madison v. FleetBoston Fin. Corp., No. CV-02-1864 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov.

On October 25, 2002, the Judicial Panel on Multidistrict Litigation held that centralization of the African American reparations suits for coordinated or consolidated pretrial proceedings was warranted. *In re* African-American Slave Descendants Litig., 231 F. Supp. 2d 1357 (J.P.M.L. 2002). Pursuant to 28 U.S.C. § 1407 (2002), the plaintiffs of the *Farmer-Paellman, Madison, Carrington,* and *Barber* cases moved for centralization in the Eastern District of New York. *Id.* at 1358. The Judicial Panel, however, ordered the transfer to the Northern District of Illinois for its central location, as requested by defendants. The Panel also noted that any other related action would be treated as potential "tag-along actions." *Id.* at 1358 n.1. As of February 6, 2003, according to the dockets of each of the cases, *Wyatt-Kervin* is the only case of the nine that is not consolidated for pretrial proceedings.

18. *See infra* Part II.

19. *See* Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994) (describing courts as the sites of cultural performances in controversial cases that shape public perceptions).

Filed in federal courts across the country, the suits are driven by African Americans who see reparations as a key to peaceful and just coexistence in America and by different teams of prominent lawyers, including attorneys involved in past Swiss Bank litigation on behalf of Holocaust victims.[20] The suits target both private businesses that profited from slavery and the state and federal governments.[21] They assert both traditional American law and international human rights claims. Through the international law claims, the suits connect with myriad postcolonial reparations efforts around the world and globalize African American reparations by linking "the highest moral plane"[22] to fight international terrorism to the United States' domestic efforts to rectify historic injustice.[23]

By asking Americans of all colors to "tunnel inside our souls to see what we truly believe about race and equality and the value of human suffering,"[24] the suits also speak to the possibility of repairing the continuing damage to the American polity itself.[25] The passionate support of and heated opposition to the suits[26] suggests that they have hit a deep public nerve. American racial justice is on trial again not only nationally but in the eyes of the world. And as Camus reminds us, the recurring trial is not itself reason for despair. The African American reparations suits are attempting in part to *repair-the-nation*, and what matters in this trial is how Americans engage the struggle.

A. *Retrying* Korematsu *and the Japanese American Internment — National Security and Civil Liberties Revisited*

In 1983, former Supreme Court Justice Arthur Goldberg admonished the *Korematsu* legal team: Forget it; trying to reopen the case is ill-advised; you haven't a chance.[27] He made sense. Forty years earlier, the Court decided the notorious *Korematsu* case[28] with seeming

20. *See Wyatt-Kervin*, No. 03-36; *Hurdle*, No. 02-4653; *Johnson*, No. 02-2712; *Bankhead*, No. 02-6966; *Porter*, No. 02-6180; *Barber*, No. 02-2084; *Farmer-Paellman*, No. CV-02-1862 *Carrington*, No. 02-1863; *Madison*, No. 02-1864; *infra* Part II.

21. *See infra* notes 148-152 and accompanying text.

22. DeYoung, *supra* note 2, at A2.

23. *See infra* Part IV.

24. Merida, *supra* note 1.

25. *See infra* Part V.

26. *See infra* Part II.

27. *See* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 341 (1990) [hereinafter Yamamoto, *Efficiency's Threat*].

28. Korematsu v. United States, 323 U.S. 214 (1944).

finality.[29] The Court in 1944 upheld the constitutionality of the race-based internment of 120,000 innocent persons of Japanese ancestry on the West Coast during World War II. Those persons, mostly American citizens, were incarcerated for years in desolate prisons surrounded by barbed wire and armed guards, without charges, trial or bona fide evidence of any threat to national security. They lost their homes, jobs, businesses, personal belongings, and, in many instances, their health and families.[30] Although sharp criticism of the case immediately followed,[31] the decision stood as a judicial landmark.

What chance, then, did a group of young volunteer attorneys have of persuading a federal district court in 1983 first, to vacate Fred Korematsu's conviction for refusing to accede to the military's internment orders, and second, to remove the continuing stigma of group disloyalty imprinted by the original *Korematsu* internment case? What chance did the team have of successfully "retrying" a forty-year-old case that, at the time, had validated eighty years of harsh anti-Asian laws and public discrimination against what politicians and media called the "yellow peril"?[32] What chance did the team and Korematsu have of reopening the case to push the United States to the "highest moral plane" — to deter future governmental civil-liberties abuses under the false mantle of national security? No chance at all, said retired Justice Goldberg.

Nevertheless, as a complement to the Japanese American redress movement in Congress, the legal team pressed forward in court, fueled by the recent discovery of a cache of War and Justice Department documents from World War II.[33] Those official documents revealed three extraordinary facts: first, before the internment, all involved government intelligence services unequivocally informed the highest officials of the military and the War and Justice Departments that West Coast Japanese Americans, as a group, posed no serious threat to national security;[34] second, the key West Coast military commander

29. *Id.* at 223-24 (finding that there was evidence of disloyalty on the part of some Japanese and that the Court could not say that the military's actions were unjustified).

30. Eric K. Yamamoto, *Friend, or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223 (1992) [hereinafter Yamamoto, *Friend, or Foe or Something Else*].

31. Eugene Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

32. Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 71-72 (1997).

33. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); *see also* Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations*, *in* ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 755 (Hyung-Chan Kim ed., 1992); JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989) [hereinafter JUSTICE DELAYED].

34. Yamamoto, *Friend, or Foe or Something Else*, *supra* note 30, at 226.

ordering the internment based his decisions on invidious racial stereotypes about inscrutable, inherently disloyal Japanese Americans and on falsified evidence of espionage and sabotage;[35] and third, the military and the War and Justice Departments concealed and destroyed crucial evidence and deliberately misled the Supreme Court in 1944 when the *Korematsu* case was argued and the Court was assessing the military-necessity justification for the internment.[36]

In January 1983, Fred Korematsu filed a rarely used petition for a writ of error coram nobis[37] to undo what the Supreme Court had originally done. The petition sought to set aside Korematsu's conviction in light of the government's egregious misconduct in falsely justifying the internment. With strong community support, the team courted the national media, spoke at schools, churches and community halls, and raised over $60,000 in small contributions to pay for litigation costs. The attorneys, most working for public interest and small private firms and the children of parents who had been interned, collectively volunteered thousands of hours for the litigation and public education campaign.[38]

The Reagan Justice Department fought hard to defeat the petition.[39] After considerable procedural skirmishing, Korematsu prevailed.[40] The federal district court in San Francisco granted his petition on the merits.[41] Judge Marilyn Hall Patel found "manifest injustice."[42] She issued an opinion castigating high-level government officials in the Justice and War Departments for deliberately misleading the Supreme Court about the proffered national security justification for the internment.[43] She also deftly highlighted the stark failure of all branches of government and the urgent need for all institutions in a democracy to actively protect cherished civil liberties, particularly in times of national fear and stress:

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35. *Id.*

36. *Id*

37. A writ of coram nobis is an extraordinary writ that operates to correct fundamental errors or to prevent manifest injustice in criminal proceedings. 28 U.S.C. § 1651 (1970). The writ, like its relative, the writ of habeas corpus, is civil in nature and is governed by rules of civil procedure. *See generally* Yamamoto, *Efficiency's Threat*, *supra* note 27, at 342; Yamamoto, *Korematsu Revisited, supra* note 13, at 2 n.6.

38. Yamamoto, *Efficiency's Threat*, *supra* note 27, at 342. *See generally* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS & REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001) [hereinafter YAMAMOTO ET AL., RACE, RIGHTS & REPARATION].

39. JUSTICE DELAYED, *supra* note 33.

40. *See* Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 143 (1986); *see also* Yamamoto, *Efficiency's Threat*, *supra* note 27, at 342.

41. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

42. *Id.* at 1417.

43. *Id.* at 1410.

> [The *Korematsu* case] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[44]

Other coram nobis legal teams in Seattle and Portland achieved similar results in reopening *Hirabayashi v. United States*[45] and *Yasui v. United States*.[46] The three coram nobis cases effectively retried the internment's legality. Along with a 1983 Congressional Commission's fact-finding report[47] on the causes of the internment and the ultimately unsuccessful *Hohri v. United States*[48] class-action damages suit, the cases provided the legal foundation for racial-reparations claims.

In the late 1980s, as the United States intensified its war on communism and the injustices of communist regimes[49] and as Japanese Americans were partly recharacterized as patriots,[50] the Reagan administration shifted political gears. Reparations to repair the harm of American injustice became a moral issue — the right thing to do — with international political consequences. Subsequently, Congress passed and President Reagan signed the Civil Liberties Act of 1988, authorizing $1.2 billion in reparations, a presidential apology, and a public education campaign.[51]

The apology and reparations were cathartic for many. Most important, for the government, political and constitutional history were rewritten. The United States sent an explicit message to the world that Congress, the President, and the courts will — if compelled — redress historic government injustice. It also sent an implicit message that the

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44. *Id.* at 1420.

45. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (vacating the conviction of Gordon Hirabayashi, which was originally affirmed in Hirabayashi v. United States, 320 U.S. 81 (1943)).

46. Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985) (reopening Yasui v. United States, 320 U.S. 115 (1943)).

47. U.S. COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1997) [hereinafter PERSONAL JUSTICE DENIED].

48. Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *aff'd. in part, rev'd. in part*, 782 F.2d 227 (1986), *vacated*, 482 U.S. 64 (1987), *on remand*, 847 F.2d 779 (1988).

49. *See generally* Yamamoto, *Friend, or Foe or Something Else*, *supra* note 30.

50. Chris Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 401-02 (1998).

51. Civil Liberties Act of 1988 (Restitution for World War II Internment of Japanese Americans and Aleuts), 50 U.S.C. app. § 1989 (2000).

United States stands on a "high moral plane" in the deciding moments of its war on communism. Indeed, Japanese American reparations are now regularly cited domestically and internationally as precedent for governments to act morally by redressing their own gross civil and human rights violations.[52]

Viewed in this light, the *Korematsu* coram nobis litigation was the retrial of an epochal race case with transformative consequences. Yet, while apt in some respects, this characterization is also significantly overstated. The *Korematsu* story remains "unfinished business."[53]

As Professor Jerry Kang observes, the coram nobis decisions did not directly criticize, and therefore publicize, the judiciary's complicity in the internment debacle.[54] In effect, looking back, the coram nobis opinions gave the Supreme Court a free pass despite its apparent duplicity during World War II. The high Court then had asserted that it was strictly scrutinizing the racial internment while doing the exact opposite — deferring, instead, to the government's unsubstantiated (and at least in part deliberately falsified) claim of military necessity.[55] The Court had also maintained that the internment was not about racism against a vulnerable minority, despite ample evidence to the contrary and Justice Murphy's stinging dissent in *Korematsu* characterizing the Court's decision as a descent "into the ugly abyss of racism."[56]

The retrial of *Korematsu* is unfinished business for another reason. Since the horrific killing of 2,300 Americans and people from countries around the world on September 11th, the old national security and civil liberties tension has reemerged at the juncture of race and religion.[57] Indeed, some in government are resurrecting "old *Korematsu*" to justify contemplated wholesale curtailment of American civil liberties.[58]

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52. ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE].

53. *See* Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131 (2000) (reflecting in keynote address delivered at the "Remembrance Through Action" San Francisco Day of Remembrance Program (Anniversary Commemoration of President Roosevelt's Internment Exec. Order 9066) on Japanese American civil rights lawsuits) [hereinafter Yamamoto, *Beyond Redress*].

54. *See* Jerry Kang, Denying Prejudice: Internment, Redress, and Judicial Denial (Mar. 14, 2003) (unpublished manuscript, on file with authors).

55. Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese Americans during World War II).

56. *Id.* at 233 (Murphy, J., dissenting) (characterizing the federal government's restriction of the civil rights of Japanese Americans as a racist act).

57. *See* Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 28 AMERASIA 51, 54 (2002).

58. Perhaps most significant is Chief Justice Rehnquist's approval of the original *Korematsu* decision (at least to first-generation Japanese in America) as part of his philosophy of almost total judicial deference to the executive branch for its constraints on civil liberties of

For instance, Peter Kirsanow, a controversial Bush appointee to the Commission on Civil Rights, predicted the broad-scale internment of Arab Americans if another terrorist attack occurs in the United States. He drew upon the original, now discredited, *Korematsu* case as legal precedent for incarcerating a racial group in the name of national security. He failed to mention that the later coram nobis cases found that the government had falsified the military-necessity basis for the internment in order to justify it in the courts and that the internment and its "legalization" had resulted in a manifest injustice warranting reparations.[59] Even more disturbing, U.S. Representative Howard Coble, head of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, said on a radio show that he agreed with the internment of Japanese Americans during World War II. Coble cited "national security" as the justification for the indefinite incarceration of innocent American citizens on the basis of their race because "some probably were intent on doing harm to us" — the very rationale refuted by the coram nobis cases. He also intimated that the same rationale would apply today to the mass detention of Arab Americans because "some of these Arab-Americans are probably intent on doing harm to us [too]."[60]

Of specific concern, one of two United States citizens of color branded "enemy combatants," Brooklyn-born Jose Padilla, has been held indefinitely in solitary confinement in a military detention camp, without charges or access to counsel.[61] The Department of Justice first proclaimed that Padilla had to be incarcerated without civil liberties protections because he was a threat to national security — he was part of an al Qaeda scheme to detonate a radiological bomb in the United States.[62] Later, the Bush administration determined that it would no

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civilians during war. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 200-11 (1998). *But see* Alfred C. Yen, *Praising with Faint Damnation — The Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV. 1, 2 (1998) (characterizing Rehnquist's approval of *Korematsu* as "praise with faint damnation").

59. *See* Chisun Lee, *Rounding up the "Enemy:" Sixty Years After It Jailed Japanese Americans, Would the U.S. Consider Another Ethnic Internment?* VILLAGE VOICE, Aug. 6, 2002, at 48 (recounting that "Peter Kirsanow . . . [recently] drew heat by suggesting that another terrorist attack on U.S. soil could stir public support for mass, ethnicity-based internments as during World War II").

60. *See* Associated Press, *Republicans Defend WWII Internments*, Feb. 6, 2003, *available at* http://www.cbsnews.com/stories/2003/02/07/politics/main.539755.shtml.

61. *See* Benjamin Weiser, *Judge Says Man Can Meet with Lawyer to Challenge Detention as Enemy Plotter*, N.Y. TIMES, Dec. 5, 2002, at A24.

62. *Id.* As a result of his capture in Afghanistan as a member of the Taliban, Louisiana-born U.S. citizen Yaser Esam Hamdi was detained at the Norfolk Naval Station Brig. *See* Hamdi v. Rumsfeld, 296 F.3d 278, 279 (4th Cir. 2002) (reversing the District Court's order which appointed counsel and ordered access to Hamdi). There he was held without criminal charges filed against him and without access to counsel. *Id.* In a decision that sharply criticized the government, Judge Doumar of the Eastern District of Virginia found that the declaration classifying Hamdi as an "enemy combatant" was "little more than the government's

longer hold him as a criminal to be tried but would detain him indefinitely as a potential witness.[63] Nonetheless, the government continued to detain Padilla without full access to counsel and sought to prevent him from challenging in court his "enemy combatant" designation.[64]

The danger of giving the government carte blanche under the mantle of national security is further underscored by the Foreign Intelligence Surveillance Court's recent excoriation of the Federal Bureau of Investigation ("FBI") for lying to the courts to obtain national security wiretaps and electronic surveillance.[65] Largely because of the persistent deception and the potential for misuse of intelligence information in criminal cases, the Surveillance Court refused the Justice Department's demand for broad new powers under the USA PATRIOT Act.[66] Nevertheless, despite concerns of potential

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'say-so.' " Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 535 (E.D. Va. 2002). The judge explained:

> [I]f the Court were to accept the [declaration] as sufficient justification for detaining Hamdi in the present circumstances. then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber stamp.

Id.

Despite Judge Doumar's strong statement, the Court of Appeals for the Fourth Circuit disagreed and found that the government's detention of Hamdi was based on sufficient information. *Hamdi*, 296 F.3d 278 (4th Cir. 2002).

63. Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (contending that Padilla is not being detained by the military for violating a civilian law but rather is being held so that he may be interrogated about the unlawful organization with which he is allegedly affiliated and to prevent him from becoming reaffiliated with it.)

64. The Bush administration has said that the executive branch's "enemy combatant" designations are not reviewable by any court. Philip Heymann, *The Power to Imprison*, WASH. POST, July 5, 2002, at B7. Other governmental acts under the mantle of national security include the following: secret deportations of immigrants, secret searches and roving wiretaps, the establishment of military tribunals for civilians, the suspension of attorney-client privilege, monitoring of religious and political organizations without suspicion of criminal activity, the unveiling of the Terrorism Information and Prevention System ("TIPS") program to recruit Americans to spy on each other, encouraging governmental denial of public record requests, and the monitoring of individuals' library and bookstore use without probable cause, along with the possible prosecution of librarians for discussing such government investigations. *See generally* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Yamamoto & Serrano, *supra* note 57, at 51-62; Charles Pope, *Looking Closer at Civil Liberties: Fear Grows that War on Terror is Trampling Rights*, SEATTLE POST-INTELLIGENCER, Sept. 10, 2002, at A1; Alisa Solomon, *Things We Lost in the Fire: While the Ruins of the World Trade Center Smoldered, the Bush Administration Launched an Assault on the Constitution*, VILLAGE VOICE, Sept. 17, 2002, at 32; Anita Ramasastry, *Do Hamdi and Padilla Need Company?*, FINDLAW, Aug. 21, 2002, *at* http://writ.news.findlaw.com/ramasastry/20020821.html.

65. In a first-ever secret meeting of a special federal appeals court, only the government was allowed to present arguments about whether Attorney General John Ashcroft had overstepped constitutional bounds in conducting surveillance and searches. *See* Solomon, *supra* note 64.

66. In light of the potential for misuse of intelligence information, a federal appeals court held that the Bush administration acted unlawfully in holding deportation hearings in secret, based only on the government's assertion that the individuals involved have links to terrorism. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

abuse of power, a special appellate panel of the Foreign Intelligence Court of Review in Washington validated the Justice Department's broad surveillance powers under the Act.[67]

Kirsanow's prediction of a possible new racial internment, the Foreign Intelligence Surveillance Court's strident criticism of the FBI for frequently lying to the court about national security, and civil liberties organizations' challenges to the Justice Department's racial profiling and indefinite and unexplained national security detention of individuals, collectively, signal an attempted replaying of "old *Korematsu*." This apparent resurrection itself reveals that crucial issues of American racial justice are on trial — again.

Key cases in constitutional history stand for far more than the specifics of the cases themselves. In their domestic and international political context, how these cases are framed, publicized, and decided puts the United States' very conception of racial justice on trial.[68] *Korematsu*, with its initial branding of Asian Americans as disloyal foreigners and its later coram nobis "liberation" of Japanese Americans, is such a case. As was *Dred Scott v. Sandford*[69] (bolstering

67. Eric Lichtblau, *Threats and Responses: Domestic Security; U.S. Acts to Use New Power to Spy on Possible Terrorists*, N.Y. TIMES, Nov. 24, 2002, at A1.

68. *See generally* Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Race Trials*, 76 TEXAS L. REV. 1293 (1998).

69. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). Bolstering the slave economy, *Dred Scott* told a story of African Americans as property, not U.S. citizens. *See id.* During the 1800s, slavery was alive. *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICAN 95 (Jean Stefancic ed., 2000) (arguing that African Americans were easier to enslave than whites). Recognizing the economic benefits of the slave trade, both Northern and Southern states initially supported slavery, despite congressional attempts to outlaw it. *See* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1013 (2002). The North and South, however, viewed the legal status of slavery differently. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 19 (3rd ed. 1992). The Southern states were more brutal in their implementation of slavery and slave laws than the Northern states. *See* PEREA ET AL., *supra*, at 108. Specifically, the North refused to accept the enslaved status of anyone within its borders while the South condoned slavery as integral to economic survival. *Id.*

Determining that African Americans were not U.S. citizens, and therefore were not entitled to the privileges and rights of citizenship, Chief Justice Taney's opinion spoke to the very concept of racial justice in America. Treating slaves as property, *Dred Scott* perpetuated a system of subordination, exploitation, and suffering.

> The question is simply this: Can a Negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?

Dred Scott, 60 U.S. at 403; *see also* BELL, *supra*, at 21. With an emphatic "No," the Court reasoned that African Americans were not intended to be considered "citizens" in the Constitution and therefore were not entitled to the rights and privileges of the Constitution unless whites conferred such privileges upon them. *Dred Scott*, 60 U.S. at 403-26 (interpreting the Constitution in the strictest sense and concluding that "while it remains unaltered, it must be construed now as it was understood at the time of its adoption . . . Any other rule of construction would abrogate the judicial characters of this court, and make it the mere reflux of the popular opinion or passion of the day"); *see also* BELL, *supra*, at 22 ("The states . . .

the slave economy by determining that African Americans were not citizens), *Plessy v. Ferguson*[70] (announcing the separate-but-equal

could not confer national citizenship, and the Constitution limited its grant of the rights and privileges of citizenship to those recognized as citizens of the several states at the time the Constitution was adopted."). Simply, African Americans were viewed over the preceding century as "a subordinate and inferior class of beings," and emancipated or not, remained subject to authority. *Dred Scott*, 60 U.S. at 407. They were unfit, according to the Constitution's framers, to be treated as human beings and citizens. *Id.* at 407-08 (recognizing a slave owner's interest in his slaves as a robust property right with deep constitutional foundations).

Rather than settling the issue of slavery and the conception of racial justice it advanced, *Dred Scott* further divided the Northern and Southern states and the Federal government from the Southern states and contributed to the outbreak of the Civil War.

70. Plessy v. Ferguson, 163 U.S. 537 (1896). Legitimizing Jim Crow segregation through the separate-but-equal doctrine, *Plessy* perpetuated the subordinate status of African Americans. *Id.* Even after the Civil War and the Reconstruction civil rights laws, most blacks were excluded from participation in white American society. Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855-1914*, 13 LAW & HIST. REV. 261, 272 (1995). This system of segregation, otherwise known as "Jim Crow," existed in virtually every phase of African American existence. *Id.* (explaining that "Negroes" were excluded from railway cars, omnibuses, stagecoaches, and steamboats or they were assigned to special "Jim Crow" sections). Jim Crow laws and the "institution of slavery protected the fundamental assumption of absolute white superiority." *Id.*

White superiority continued throughout, and extended beyond, the Civil War. *Id.* at 273. During the postwar years, however, the granting of citizenship and suffrage appeared likely, especially with the enactment of the Thirteenth Amendment. U.S. CONST. amend. XIII (ending the Constitution's protection of slavery, but not resolving the issue of the newly freed slaves' political status). In addition, to avoid the violence that might result to force freed blacks back into slavery, the Reconstructionists enacted the Fourteenth Amendment. U.S. CONST. amend. XIV (providing for the equal protection of the laws). These advances, however, were met with violence and terror. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes — Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 369 (2002). Within decades of its enactment, the Thirteenth Amendment's abolition of slavery was obsolete. BELL, *supra* note 69, at 39. Moreover, African Americans became victims of judicial interpretations of the Fourteenth Amendment, rendering the promised protection meaningless. *Id.* (explaining that little was accomplished to ensure the political and economic rights of African Americans and the basic rights of African Americans to citizenship was essentially worthless).

Plessy crystallized this victimization under the Fourteenth Amendment. At stake was whether the Court would give full meaning to the Equal Protection Clause and the Reconstruction civil rights statutes or continue to undermine them and sanction formal legalized segregation.

Validating the "separate but equal" doctrine, the Court upheld the 1890 Louisiana Separate Car Act, which required separate but equal railroad accommodations for black and white passengers traveling within the state. *Plessy*, 163 U.S. at 540. Relying on Jim Crow principles, Justice Brown reasoned that the statute did not impose "any badge of slavery or servitude upon the [petitioner]." *Id.* at 542. Extending *Dred Scott*'s premise that African Americans were inferior and unfit to associate with whites, the Court launched a frontal assault on the Fourteenth Amendment, undermining the Amendment's purpose:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

Plessy, 163 U.S. at 544; *see also* Wolff, *supra* note 69, at 976-77. American racial justice was placed on trial, and the verdict was the legalization of segregation in all social spheres — including housing, transportation, education, and public accommodations. In particular, *Plessy* demonstrated the Court's and society's deep commitment to white supremacy. Welke,

doctrine to legitimate Jim Crow segregation), *Brown v. Board of Education*[71] (overruling *Plessy* and ending overt governmental racial discrimination), and the Rodney King police trials[72] (sparking an

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supra, at 312 (explaining that the doctrine of "separate but equal" became a part of everyday life and effectually enhanced white superiority); *see also* Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1750 (1993) (explaining that white supremacy was "maintained through the institutional protection of relative benefits for whites at the expense of Blacks"). By "denying that any inferiority existed by reason of de jure segregation, and [by] denying white status to Plessy, 'whiteness' was protected from intrusion and appropriate boundaries around the property were maintained." *Id.* at 1750. Establishing the doctrine of "separate but equal," *Plessy* legitimized the worst form of race discrimination.

71. Brown v. Bd. of Educ., 347 U.S. 483 (1954). Beginning in the 1930s, the African American Civil Rights movement gained momentum. Defined by its legal strategies, the movement sought to challenge segregation in the courts. During the Cold War, the U.S. fought against communism and for the hearts and minds of democracy supporters around the world. *See generally* Bell, *Interest-Convergence Dilemma*, *supra* note 8. In this setting, the Supreme Court decided *Brown*.

In 1954, the Court declared that separate was no longer equal. *Brown*, 347 U.S. at 495. Confronting the issue — "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" — the Court condemned legalized race segregation in public schools as "inherently unequal." *Id.* at 493, 495 (holding that the evil of state-mandated segregation was the conveyance of a sense of unworthiness and inferiority). Following the decision, federal courts outlawed most forms of overt state-sponsored segregation.

Despite this judicial condemnation, however, white supremacy continued. Harris, *supra* note 70, at 1751. Notwithstanding the Court's articulation that the separate but equal doctrine had no place in the field of public education, the Court "failed to expose the problem of substantive inequality." *Id.* at 1752-53 (arguing that *Brown* "dismantled an old form of whiteness as property while simultaneously permitting its reemergence in a more subtle form"). By selecting desegregation as the sole remedy, the Court defined the harm solely as racial segregation. *Id.* at 1755 ("*Brown II's* order to desegregate with all deliberate speed was so open-ended that it engendered increasingly protracted battles with social and political forces that defiantly resisted court-ordered integration.").

Brown deeply affected international perceptions of America in the Cold War. Delgado, *supra* note 70, at 373; *see also* DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 9, at 3-6. *Brown* provided instant credibility to America's struggle with communist countries; it offered reassurance to African Americans that "equality" and "freedom" would be given meaning at home. BELL, *supra* note 69, at 640; *see also infra* Part IV for a further discussion of this point.

72. *See* Amended Indictment, People v. Powell, (Cal. Super. Ct.) (No. BA-035498) (returning jury verdicts of acquittal on all counts except for the excessive use of force charge against Officer Powell, on which the jury was unable to reach a decision), *available at* http://www.pacer.psc.uscourts.gov. In 1991, baton-wielding Los Angeles police officers savagely beat motorist Rodney King. Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 63 n.1 (1993) (noting reports which document that police struck Rodney King at least fifty-six times and kicked him a minimum of six times). A bystander captured the assault on videotape. *Id.* at 63. Within days, the nation witnessed the excesses of some members of the Los Angeles Police Department. *Id.* Despite widespread shock and outrage, however, a jury of ten whites, one Latino and one Asian American, in a court in Simi Valley, an upper-middle-class, largely white suburb, acquitted the police. *Id.* at 64. Rodney King had been painted by the defense attorneys as an African American aggressor who couldn't possibly be the victim of violence:

> Echoing a theory proffered by the defense, one juror stated that Rodney King "was in full control" of the situation, even as he absorbed more than fifty blows from police officers armed with service revolvers, batons and Tasers. Such an explanation (for the jury's leniency) recalls the racist stereotype of the "Black savage." It transforms Rodney King into a

uprising and riots in the face of perceived continuing institutionalized racial injustice).[73]

Each of these cases, and the public trials that shaped them, were epochal racialized events.[74] In some respects they introduced new issues and ideas to the American public. In other respects they replayed the same racial themes in new settings. For good or ill, they informed how the American public and the world at the time came to view American racial justice under the law. And in turn they influenced, and were influenced by, the moral standing of the United States in international political affairs.[75]

Now, in addition to revisiting *Korematsu*, the United States faces a second epochal race "re-trial" — one likely to traverse the national consciousness for years.

B. *Retrying African American Reparations Claims — An Overview*

This epochal event for the American polity is marked collectively by ten recently filed[76] and at least one forthcoming African American

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wild and ferocious Black "buck" who, like his counterpart in Hollywood fantasy, could somehow threaten life, limb and property while lying prone and surrounded by more than two dozen of Los Angeles' finest.

Id. at 64-65. The acquittal unleashed days of violence and protest in South Central Los Angeles that resulted in billions of dollars in property damage and dozens of deaths. Commentators and those on the frontlines called the legal system racist. The criminal justice system subjugated African Americans; the Rodney King decision permitted attackers of a member of the African American community to go unpunished. *Id.* The verdict, they said, validated attacks against African Americans. "The predominantly Black residents of South Central Los Angeles received this message loud and clear, and registered their disapproval in a fit of self-destructive anger and despair within hours after the jury announced its decision." *Id.* at 65-66.

73. Nunn, *supra* note 72, at 65-66.

74. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (1994) (describing the process of racialization where events and actors create racial meaning).

75. *See generally* Bell, *Interest-Convergence Dilemma*, *supra* note 8.

76. The cases filed include Wyatt-Kervin v. J.P. Morgan Chase, No. 03-36 (S.D. Tex. filed Jan. 21, 2003), *available at* http://www.pacer.psc.uscourts.gov; Hurdle v. FleetBoston Fin. Corp., No. 02-4653 (N.D. Cal. filed Sept. 25, 2002), *available at* http://www.pacer.psc.uscourts.gov; Johnson v. Aetna Life Ins. Co., No. 02-2712 (E.D. La. filed Sept. 3, 2002), *available at* http://www.pacer.psc.uscourts.gov; Bankhead v. Lloyd's of London, No. 02-6966 (S.D.N.Y. filed Sept. 3, 2002), *available at* http://www.pacer.psc.uscourts.gov; Porter v. Lloyd's of London, No. 02C-6180 (N.D. Ill. filed Aug. 29, 2002), *available at* http://www.pacer.psc.uscourts.gov; Barber v. FleetBoston Fin. Corp., No. 02-2084 (D.N.J. filed May 1, 2002), *available at* http://www.pacer.psc.uscourts.gov; Farmer-Paellman v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov; Carrington v. FleetBoston Fin. Corp., No. CV-02-1863 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov; and Madison v. FleetBoston Fin. Corp., No. CV-02-1864 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov. *See supra* note 17 and accompanying text.

reparation suits[77] and suits in American courts on behalf of South African apartheid victims.[78] African American racial justice is on trial — again.

African American reparations claims are nothing new. They emerged immediately following the Civil War,[79] and the first reparations lawsuit was attempted and failed in 1915.[80] The context for reparations claims then and now, however, differs dramatically.

First, the world is now in the midst of what has been described as an "Age of Reparation."[81] Groups from myriad countries are seeking, sometimes successfully, reparations for historic government-inflicted suffering and private-business exploitation.[82] Indeed, recent African

77. Charles J. Ogletree, Jr., *The Case for Reparations*, USA WEEKEND, Aug. 16-18, 2002, at 6 [hereinafter Ogletree, *The Case for Reparations*], *available at* http://www.usaweekend.com/02_issues/020818/020818reparations.html.

78. On December 16, 2002, the Judicial Panel on Multidistrict Litigation found that the three actions seeking reparations on behalf of South Africans who were victims of apartheid-related crimes should be centralized under 28 U.S.C. § 1407 (1993) in the Southern District of New York. *In re* South African Apartheid Litig., 238 F. Supp. 2d 1379 (J.P.M.L. 2002). Defendants named included Amdahl Corp.; Citigroup Inc.; Citicorp; Citibank, N.A.; Commerzbank AG; Dresdner Bank AG; Credit Suisse Group; Deutsche Bank AG; General Motors Corp.; IBM Corp.; Mobil Corp.; UBS AG; and Unisys Corp. *Id.* at 1380. In addition to these three actions, the parties notified the Panel of seven related federal-court actions pending, which will be treated as potential tag-along actions. *Id.* at 1380 n.1.

79. Since the end of the Civil War, the United States has recognized the need to provide reparations for African American slaves. In 1865, Congress passed a bill (which President Andrew Johnson vetoed) calling for the seizure of Confederate property, from which "40 acres and a mule" would be given to the former enslaved blacks. *See* David A. Love, *America Owes a Debt to Blacks for Its Past Sins*, HOUSTON CHRON., Feb. 7, 2000, at 21A.

80. In 1915, Cornelius J. Jones filed suit against the United States Department of Treasury to recover $68 million for slaves. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 205 (2000). Jones argued that the government benefited from the tax on raw cotton produced by slave labor. *Id.* A federal court of appeals, however, dismissed the suit, reasoning that the government did not consent to be sued. *Id.*; Johnson v. MacAdoo, 45 App. D.C. 440 (1916).

81. *See* Eric K. Yamamoto, *Teaching Race Through Law: "Resources for a Diverse America,"* 89 CAL. L. REV. 1641, 1650 (2001) (book review) (noting that we have entered an era in which communities, governments, and nations are attempting, through the varying forms of reparations, monetary and nonmonetary, to repair the enduring personal and societal damage of injustice); *see also* Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 LA RAZA L.J. 387 (2002); Ediberto Roman, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 LA RAZA L.J. 369 (2002).

82. At the federal level, groups have asserted federal reparations claims seeking money, property, or an apology for historic racial injustices, with varying levels of success. In 1971, the United States awarded indigenous Alaskans nearly $1 billion and forty-four million acres of land in the Alaska Native Claims Settlement Act. Yamamoto, *Racial Reparations*, *supra* note 4, at 498. In the 1980s, the United States provided five Native American nations money for stolen land and broken treaties. *Id.* at 484 n.22. The 1988 Civil Liberties Act provided a formal apology to Japanese American survivors of World War II internment camps, compensated each survivor with $20,000, and instituted an educational fund. Civil Liberties Act of 1988 (Restitution for World War II Internment of Japanese Americans and Aleuts), 50 U.S.C. app. § 1989 (2000). President Clinton apologized to indigenous Hawaiians for the illegal American-aided overthrow of the sovereign nation and the near decimation of Ha-

American reparations claims against governments have succeeded in two specific instances — for systematic loan discrimination against African American farmers by the Department of Agriculture[83] and for

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waiian life that followed. Claims that are still pending include: Native Hawaiian claims for land and money reparations from the U.S. and the state of Hawai'i, Native American reparations claims for treaty violations by the U.S., and African American slavery-based reparations claims. Yamamoto, *Racial Reparations*, *supra* note 4, at 484. The federal government offered reparations to the African American victims of the Tuskegee syphilis experiment and agreed to apologize to and provide limited reparations for Japanese Latin Americans kidnapped from Latin American countries and placed in internment camps as hostages during WWII. Over the past twenty-five years, a worldwide trend of offering apologies and reparations to groups wrongfully harmed by governmental actions has also emerged. In 1976, Australia provided ninety-six thousand square miles of land to its aborigines. Lori S. Robinson, *Growing Movement Seeks Reparations for U.S. Blacks*, ARIZ. REPUBLIC, June 22, 1997, at H1. Canada followed suit in 1980, giving Japanese Canadians $230 million for the World War II internment and giving their indigenous peoples 673,000 square kilometers of land. *Id.* In 1995, Austria promised $25 million to Jewish Holocaust survivors. *Id.* The United States joined the reparations trend in December 1999, by signing an agreement with Germany and Eastern Europe to pay $5 billion to Nazi slave laborers and their families. Love, *supra* note 79. The West African country of Benin, formerly known as Dahomey, which served as an important supplier of slaves to the Slave Coast, sent a delegation to America to apologize for its promotion of the slave trade. Matthew Campbell, *A Sorry State of Affairs*, SUNDAY TIMES (London), June 4, 2000, at 31. Approximately twenty nations have appointed commissions to study the harms inflicted on groups by governments with varying results. Robert F. Drinan, *Reparations for Slavery Long Overdue*, NAT'L CATHOLIC REP., Apr. 28, 2000, at 23. The current reparations effort was also inspired by the success of Jewish groups reclaiming assets from German and Swiss firms. Tony Pugh et al., *Slavery Suits Filed; More on the Way*, SEATTLE TIMES, Mar. 27, 2002, at 1.

Representative John Conyers of Michigan has proposed a bill every year since 1989, calling for a commission to study the effects of slavery and to make recommendations to Congress for redress. Merida, *supra* note 1. Former Representative Tony Hall of Ohio also proposed an apology bill that would have included the establishment of a commission to study slavery's impact on African Americans, funding for educational programs, and a national slavery museum. Bruce Alpert, *Slaves Who Built Capitol, White House May Get Honor*, GRAND RAPIDS PRESS, July 16, 2000, at A16; *see also* Harris, *supra* note 3. Representative J.C. Watts of Oklahoma, chairman of the Republican Conference and the only black GOP House member, also asked Congress to create a task force to study the contributions of slaves who helped build the Capitol and White House and to recommend a permanent memorial. *See* Alpert, *supra.* Historian and television reporter Edward Hotaling found pay stubs from the 1790's calling for payment of $5 a month to slave owners for their slaves. Senator Blanche Lincoln of Arkansas and former Senator Spencer Abraham of Michigan have also introduced similar measures. *Id.*

In 1995, African Americans sued the federal government, seeking $100 million in reparations for slavery, acknowledgment of the injustices done to African Americans from the start of slavery in 1619 to the present, and an official apology from the government. Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995). The Ninth Circuit affirmed dismissal of the suit, holding that sovereign immunity barred suit against the government and that the plaintiffs did not state a legal claim. *Id.* at 1108, 1111.

83. In 1998, four hundred and one African American farmers from Alabama, Arkansas, California, Florida, Georgia, Illinois, Kansas, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia filed a class-action lawsuit against the United States Department of Agriculture ("USDA") seeking damages for the government's history of racial bias in lending and subsidies from 1981 to 1996. *See* Pigford v. Glickman, 182 F.R.D. 341 (D.D.C. 1998). A January 1999 consent decree tentatively ordered the USDA to pay black farmers at least $50,000 in cash and debt relief and to return foreclosed lands to those farmers affected by the discrimination. Pigford v. Glickman, 185 F.R.D. 82, 95 (D.D.C. 1999); *see also* Salim Muwakkil, *USDA Settlement Advances Argument for Reparations*, CHI. TRIB., Jan. 18, 1999, § 1, at 15; *Pigford v. Veneman*: Consent Decree in Class

a Florida local government's support of wholesale murder and mayhem in the black township of Rosewood in 1923.[84] And American courts have been the locus of reparations suits on behalf of Jewish Holocaust victims against Swiss Banks (for keeping victims' deposits) and against German businesses for profiteering off of Nazi-sponsored World War II slave labor. Although these suits faltered legally, they succeeded in shedding harsh light on past practices and in inducing "political" settlements.[85]

Action Suit by African American Farmers, *available at* http://www.usda.gov/da/consent.htm (last updated July 10, 2003). The consent decree settlement, however, is fraught with difficulty. Many black farmers' claims have been denied because the farmers have been unable to prove direct discrimination by the USDA; the farmers' attorney missed court-imposed deadlines and was reprimanded in several court orders; the USDA vigorously opposed the majority of the specific claims, even after admitting to general discrimination in farm loans; the amount of the settlement (for those farmers who received it) is small and not enough for many of them to survive. Neely Tucker, *A Long Road of Broken Promises for Black Farmers*, WASH. POST, Aug. 13, 2002, at A1. The nation's largest black farmers' organization is staging protests across the country against the terms of the settlement. *Id.*

84. In 1994, the Florida State Legislature awarded $150,000 to each of the nine survivors of the 1923 Rosewood massacre. 1994 Fla. Laws ch. 94-359. The Oklahoma Tulsa Race Riot Commission ("Commission") recommended reparations for the victims of the 1921 mob killings and lootings in Greenwood, Oklahoma. Alfred L. Brophy, Reconstructing the Dreamland: Contemplating Civil Rights Actions and Reparations for the Tulsa Race Riot of 1921 (2000), *available at* http://www.law.ua.edu/staff/bio/abrophy/reparationsdft.pdf. The Oklahoma Legislature, however, has not unequivocally funded the reparations recommended by the Commission. It has passed legislation to part of the recommended settlement in the amount of approximately $10 million has only appropriated funds from the monies not otherwise appropriated from the General Revenue Fund of the State Treasury for the fiscal year ending June 30, 2003. These appropriations do not include reparations to the victims. 2002 Okla. Sess. Laws 362.

See *infra* note 151 for Tulsa Race Riot reparations suit filed on March 20, 2003 by the Reparations Coordinating Committee.

Several city councils reportedly have adopted resolutions seeking federal and state hearings on reparations for descendants of slavery. *Politicians, Scholars Voice Support for Slavery Reparations*, JET, May 15, 2000, at 6, *available at* http://www.findarticles.com/cf_0/m1355/23_97/62298398/p1/article.jhtml. Chicago now joins Cleveland, Detroit, Dallas, and Inglewood, California, in adopting such resolutions. Amy Franklin, *Bills Would Give Slaves' Ancestors Tax Credits*, GRAND RAPIDS PRESS, Apr. 18, 2000, at D8, *available at* 2000 WL 19582891; Colbert I. King, *Reparations: Yes or No?*, WASH. POST, June 10, 2000, at A23; Gary Washburn, *Daley, Council Join in Slavery Apology*, CHI. TRIB., May 18, 2000, § 2, at 1; Monica Whitaker, *Slave Reparations to Be Discussed at Risk Forum*, TENNESSEAN, Dec. 21, 2000, at 1A. In California, a new law requires all insurance companies to search their archives and to disclose any insurance policies written to insure slaves. CAL. INS. CODE § 13812 (West 2003); Jason B. Johnson, *California Releases Slave-related Records; Blacks in S.F. Can Scan Documents: "I'd Like to Learn from This,"* S.F. CHRON., May 1, 2002, at A1, *available at* 2002 WL 4019310.

85. *See* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (consolidated class-action suit by World War II slave laborers forced into slavery by Nazi Germany); *see also* Agence France-Press, *Apartheid Suit Lawyer Ed Fagan in Spotlight*, Jun. 26, 2002, IAFRICA.COM (detailing Ed Fagan's series of compensation claims filed against Swiss banks on behalf of several thousand survivors of the Nazi Holocaust), *available at* http://business.iafrica.com/features/989023.htm; *Financial Compensation for Nazi Slave Laborers*, *at* http://www.religioustolerance.org/ fin_nazi.htm (last modified Dec. 8, 2001) (discussing the reparations suits filed on behalf of World War II Nazi slave laborers); Press Release, Senator Charles E. Schumer, Schumer Introduces Legislation to Bring Justice to WWII Slave Laborers: Bill Would Allow Survivors to Sue Companies that Profited Unjustly

Second, these reparations claims differ from earlier ones because current broad-scale domestic and international developments are generating an increasingly potent American self-interest in African American redress.

Domestically, conservative politicians, think tanks, advocacy groups, and judges have dismantled significant aspects of the civil rights edifice of the 1960s fought for by African Americans as well as supportive whites, Asian Americans, Latinos, and Native Americans.[86]

Under Nazism (Nov. 4, 1999) (seeking relief for WWII slave laborers), *available at* http://schumer.senate.gov/SchumerWebsite/ pressroom/press_releases/PR00068.html.

86. These conservative groups have successfully waged systematic legal attacks in the courts and legislatures along with a cultural and political crusade through ballot initiatives and the mainstream media. *See* SALLY COVINGTON, NAT'L COMM. FOR RESPONSIVE PHILANTHROPY, MOVING A PUBLIC POLICY AGENDA: THE STRATEGIC PHILANTHROPY OF CONSERVATIVE FOUNDATIONS (1997) (outlining conservative foundations' strategic grant-making to think tanks, advocacy organizations, law firms, and media outlets in order to re-shape politics, public policy, and public consciousness); INST. FOR DEMOCRACY STUDIES, THE FEDERALIST SOCIETY AND THE CHALLENGE TO A DEMOCRATIC JURISPRUDENCE (2001) (outlining the Federalist Society's concerted challenges to constitutional concepts of social justice, democracy, and the American legal system); PEOPLE FOR THE AMERICAN WAY, BUYING A MOVEMENT: RIGHT-WING FOUNDATIONS AND AMERICAN POLITICS (1996) (discussing conservative foundations' funneling of millions of dollars into conservative think tanks, institutes, political organizations, advocacy groups, universities, radio programs, student journals, and state policy centers), *available at* http://www.pfaw.org/dfiles/file_33.pdf; JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 139-54 (1996); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing the "New Right's" hostility toward civil rights enforcement); Trevor W. Coleman, *Race Matters*, CRISIS, Nov.-Dec. 2002, at 20-24 (describing the American Civil Rights Coalition's new "Racial Privacy Initiative"(aiming to ban the collection of data on race by California) and Proposition 209 (eliminating California's use of affirmative action)); Trevor W. Coleman, *Walsh's Verdict: Federalist Society Can Divide Judiciary*, DETROIT FREE PRESS, July 8, 1999, at 10A (discussing the Federalist Society's negative stance on civil rights, women's rights, gay rights, and environmental protections); Greg Winter, *Colleges See Broader Attack on Their Aid to Minorities*, N.Y. TIMES, Mar. 30, 2003, at A16 (reporting on the Center for Equal Opportunity's and American Civil Rights Institute's threats to file federal complaints against thirty universities who maintain minority scholarships and summer programs).

Republican-appointed federal judges have actively participated in dismantling key aspects of the 1960s' civil rights edifice. *See* LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, JUDICIAL INDEPENDENCE AT THE CROSSROADS: THE IMPORTANCE OF PROMOTING AND PRESERVING JUDICIAL INDEPENDENCE TO THE CIVIL RIGHTS COMMUNITY (2002) (describing the judicial rollback of civil rights); Dawn Johnsen, *Tipping the Scale*, WASH. MONTHLY, July-Aug. 2002, at 15 (describing the Reagan Administration's unprecedented remaking of the judiciary and its development of strategic legal reports detailing ways to limit abortion, affirmative action, and Congressional power), *available at* http://www.washingtonmonthly.com/features/2001/0207.johnsen.html. The Bush administration continues to appoint judicial nominees who are regarded as anti-civil rights. *See* Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367 (2002); Jack Newfield, *The Right's Judicial Juggernaut*, NATION, Sept. 7, 2002, at 11 (outlining the Bush administration's judicial nominees' hostility to voting rights and civil rights, and noting that the right "already controls seven of the thirteen circuit appeals courts"), *available at* http://thenation.com/doc.mhtml?i=20021007&s=newfield; *Filibustering Priscilla Owen*, N.Y. TIMES, Apr. 17, 2003, at A24 (arguing that senators should use the filibuster to block Administration judicial nominees that have been aggressively hostile to civil rights, women, the disabled, and victims of discrimination).

Yet the racial playing field remains sharply tilted.[87] African American socioeconomic conditions, for instance, continue to reflect stark

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A divided Supreme Court has undermined civil rights under the Fourteenth and Fifteenth Amendments by banning claims of institutional discrimination, Washington v. Davis, 426 U.S. 229 (1976); invalidating affirmative action programs, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); limiting federal court powers to monitor school desegregation, *see, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); rejecting proof of racially discriminatory impact in death-penalty sentencing, McCleskey v. Kemp, 481 U.S. 279 (1987); countermanding state redistricting designed to ensure that minority votes count, *see, e.g.*, Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899, 924 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993); invalidating disability rights legislation, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); and striking down state constitutional provisions that provide Native Hawaiian elections as a measure of self-determination, Rice v. Cayetano, 528 U.S. 495 (2000). *See also* Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance And Reconstruction*, 31 CUMB. L. REV. 523 (2001) [hereinafter Yamamoto et al., *Dismantling Civil Rights*].

The Court also has dismantled civil rights through its development of the Eleventh Amendment, the Commerce Clause, and the movable mantle of "states' rights," deferring to states when they cut back on civil rights and overruling states when they expand civil rights protections. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Seminole Tribe. v. Florida, 517 U.S. 44 (1996); United States v. Lopez, 514 U.S. 549 (1995). For instance, it narrowly redefined the reach of the Constitution's Commerce Clause to block a Congressional act civilly advancing women's rights to be free from violence, United States v. Morrison, 529 U.S. 598 (2000), and invalidated key parts of age discrimination legislation, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). It narrowly interpreted the employment discrimination remedies of Title VII of the Civil Rights Act. *See* Saint Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). It invalidated an individual's right to enforce federal agency disparate impact regulations under Title VI, accelerating the law's movement toward increasing legal acceptance of discrimination against America's communities of color. Alexander v. Sandoval, 532 U.S. 275 (2001). And as discussed below, the Bush administration has implemented controversial restrictions on civil liberties of both immigrants and citizens as part of its war on terror. *See infra* Part VI.

87. The efforts to dismantle civil rights, including the attacks on affirmative action, have had real consequences. For example, the incarceration rate for African American males is over four times higher than that of whites. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTION POPULATIONS IN THE UNITED STATES, 1997, at 6, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9704.pdf. The number of African Americans below the official poverty line has steadily increased "from 7.5 million in 1970 to 8.6 million in 1980, to 9.8 million in 1990, to 10.9 million in 1993," an increase of over thirty percent. STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 212-13 (1995). African Americans, who are twelve percent of the population, account for twenty-nine percent of the poor. *Id.* at 213. "Nearly half of all black children under age eighteen are being raised in families below the poverty line, as compared to 16 percent of whites." *Id.* In 2000, African American applicants were more than twice as likely to be turned down for a conventional mortgage loan as white applicants. Thomas Grillo, *ACORN Finds Lending Disparities Continue*, BOSTON GLOBE, Oct. 6, 2001, at E1. Latinos were rejected almost fifty percent more often than whites. *Id.*; *see also* CONGRESSIONAL BLACK CAUCUS, CONGRESSIONAL HISPANIC CAUCUS, HOUSE DEMOCRATIC LEADER NANCY PELOSI, & SENATE DEMOCRATIC LEADER TOM DASCHLE, THE IMPACT OF THE BUSH BUDGET ON BLACK AND HISPANIC FAMILIES: LEAVING TOO MANY BEHIND (March 27, 2003); Civil Rights Project at Harvard Univ. & Lewis Mumford Center for Comparative Urban and Regional Research at State Univ. of N.Y., Albany, Housing Segregation: Causes, Effects, Possible Cures (Apr. 3, 2001) (reporting that housing segregation and discrimination in home finance markets persists and is growing), *available at* http://www.civilrightsproject.harvard.edu/research/metro/housing_gary.php;

inequalities.[88] Immigrants of color regularly face discrimination and, at times, mainstream hostility.[89] The wounds of historic conquest, land confiscation, and culture destruction remain for many Native

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Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003) (describing how Supreme Court decisions in the 1990s have contributed to the rapid resegregation of African American students, particularly in the South), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

Racial minorities continue to face discrimination in employment, housing, and access to health care. *See* U.S. GEN. ACCOUNTING OFFICE, EQUAL EMPLOYMENT OPPORTUNITY: DISPLACEMENT RATES, UNEMPLOYMENT SPELLS, AND REEMPLOYMENT WAGES BY RACE, GAO/HEHS-94-229FS (Sept. 1994), *available at* http://archive.gao.gov/t2pbat2/152533.pdf; RAND E. ROSENBLATT ET AL., LAW AND THE AMERICAN HEALTH CARE SYSTEM 108-09 (1997), *quoted in* Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 820 & n.195 (1998); Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1474-76 (1994). State-sponsored English-only laws, bans on bilingual education, anti-immigrant initiatives, and repeals of affirmative action programs impede racial minorities' full participation in American society. *See* ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 75-78 (1998) (describing the race-based scapegoating of immigrants through measures such as California's Proposition 187, the federal Illegal Immigration Reform and Immigrant Responsibility Act, and the Immigration Reform and Control Act); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 41-52 (1996); IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 2-5 (Juan Perea ed., 1997) (discussing how Proposition 187, the official English movement, and federal legislation denying benefits to undocumented persons is part of the "deteriorating treatment and scapegoating of undocumented persons [that] is vitally linked to the deteriorating treatment and scapegoating of persons of color, minorities, and women."); Christian A. Garza, *Measuring Language Rights Along a Spectrum*, 110 YALE L.J. 379, 386 n.2 (2000) (observing that twenty-six states have enacted English-only laws); William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1 (2003) (reporting on the precipitous drops in African American and Latino enrollments since the repeal of affirmative action admissions programs at various law schools); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992); Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes:* Yniguez *and the Racialization of English Only*, 19 U. HAW. L. REV. 221 (1997) (describing English-only policies' detrimental effects on Latinos and other immigrant groups); Winter, *supra* note 86; *see also* California Proposition 187 (1996) (restricting rights of immigrants); California Proposition 209 (1996) (banning affirmative action programs). Many city public schools are segregated along racial and ethnic lines, with marked differences in the quality of education. *See* Frankenberg et al., *supra* (reporting that the desegregation of African American students has receded to levels not seen in three decades, and that African American students are experiencing the most rapid resegregation in the South, triggered by Supreme Court decisions in the 1990s).

88. STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL INJUSTICE IN AMERICAN THOUGHT AND POLICY 212, 213 (1995) (citing statistics and observing that in terms of major social indicators "a far less sanguine picture emerges — one of persistent and even widening gaps between blacks and whites in incomes and living standards.").

89. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1112 (1998) ("A deeply complicated, often volatile, relationship exists between racism directed toward citizens and that aimed at noncitizens."). *See generally* Gabriel J. Chin et al., *Beyond Self Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129 (1996).

Hawaiians, Native Americans, and some Latinos. Moreover, poverty still tends to have a racialized face.[90] The "color line," identified by W.E. B. DuBois one hundred years ago as the issue of the century, still looms large in day-to-day American life.[91] It is precisely these continuing inequalities and discrimination, coupled with the attacks on civil rights and affirmative action, that give traction domestically to the current African American reparations movement.[92]

Internationally, many now independent nations, including South Africa and New Zealand, struggle to rectify the injustices and continuing harms of historic colonialism.[93] At the same time, the United States increasingly appears indifferent to concerns of other nations regarding free trade and human rights covenants.[94] While American economic and military power is respected, even feared, its actions on human rights, generally speaking, are not.[95] Many European, Middle Eastern, and African leaders doubt the United States' sincerity on global economic and justice issues.[96] As one commentator put it: "To many of [those countries the United States has] lost the moral high ground. There is a growing perception that with its solo superpower status, the Bush administration is saying to the rest of the world: Who cares what you think?"[97]

Fanning the flames is the United States' refusal to adhere to its agreement to submit to the jurisdiction of the new International Criminal Court ("ICC");[98] its threats to withdraw support of UN

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90. The poverty rate for blacks in 2001 was 22.7 percent, higher than the rates for people of all other racial and ethnic groups. BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. DEP'T. OF COMMERCE, POVERTY IN THE UNITED STATES: 2001 (2002), *available at* http://www.census.gov/prod/2002pubs/p60-219.pdf.

91. *See generally* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (1903).

92. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 432-33 (1998).

93. *See generally* Jon M. Van Dyke, *Reparations for the Descendants of American Slaves Under International Law*, *in* SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Raymond A. Winbush, ed., 2003).

94. *See* Helen Thomas, *Arrogance Pushes United States Further into Diplomatic Isolation*, HONOLULU STAR-BULL., Aug. 25, 2002, at D3.

95. *Id.* (explaining that, with respect to its actions on human rights, the United States has lost "the moral high ground" with European and other nations).

96. *Id.*

97. *Id.*

> I just hope America doesn't cross the line and become what Japan was before . . . America has become rich and powerful and arrogant. The impression we had of America in the 1960s — a lovely, good America — can't be found anymore. If a country begins to think too much of itself and its power, it will destroy itself.

Id. (quoting Yojiro Iokibe, a Japanese pilot during World War II).

98. *Bush Issues Formal Rejection of the International Criminal Court*, LIFESITE, May 6, 2002, *at* http://www.lifesite.net/ldn/2002/may/020506a.html (discussing the U.S. rejection of ICC jurisdiction and reiteration that the U.S. will not submit to ICC orders).

peacekeeping in Kosovo unless the American UN peacekeepers are specially exempted from ICC jurisdiction;[99] its unilateral withdrawal from the Kyoto global warming protocol;[100] its threat to scuttle the Anti-Ballistic Missile Treaty;[101] its widely criticized refusal effectively to participate in the 2001 United Nations Conference on Racism in Durban, South Africa (partly because reparations for slavery were at issue);[102] its tepid acknowledgment of Palestinian human rights in the Israeli-Palestinian conflict;[103] and willingness to wage a preemptive war against Iraq without United Nations approval.[104] Significantly, the widespread European moral and pragmatic opposition to America's embrace of the death penalty elicited acknowledgment from a reluctant Supreme Court.[105] Even American supporters believe the United States may not be operating from the "highest moral plane" in its global war on terror.[106] For instance, Chris Patten, the European Union's Foreign Affairs Commissioner, worried that arrogant actions on the part of the United States are squandering initial support for the war on terrorism.[107] The United States "will be accused of putting itself

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99. *See Both Sides Lose — The Row Over the International Criminal Court*, ECONOMIST, Jul. 20, 2002 (noting that America eventually agreed to a resolution which extended immunity for twelve months to all soldiers or officials from countries which have not ratified the treaty; this immunity has to be renewed by the council every twelve months).

100. *See* Zhubin Parang, *Bush Administration Pulls out of Kyoto Agreement*, ORBIS, Apr. 17, 2002, *at* http://www.vanderbiltorbis.com/vnews/display.v/ART/ 2002/04/17/3cbcffe 90502 (stating that the United States' withdrawal reduces its credibility in environmental discussion); *see also* Ron Hutcheson & Seth Borenstein, *Bush Speech to tell Allies He'll Help Fight Global Warming*, PITTSBURGH POST-GAZETTE, June 10, 2001, at A4 ("[T]he President angered European allies and environmentalists worldwide by suggesting the United States would abandon the 1997 Kyoto accord.").

101. Dave Montgomery, *Russia Leans Toward Saving ABM Treaty While U.S. Insists It's a Cold War Relic*, SAN JOSE MERCURY NEWS, July 27, 2001, at 4A.

102. Samson Mulugeta, *Gallout on Pullout; UN Meeting Negotiates on New Wording*, NEWSDAY, Sept. 5, 2001 at A07; *see infra* Section IV.A.

103. *Europe and the Jews: Is Anti-Semitism Surging Back?*, ECONOMIST, May 4, 2002, at 12-13.

104. Joe Klein, *Where Have You Gone, Condi Rice?*, TIME, Apr. 14, 2003, at 29:

> [B]ut this war hasn't been nearly so simple as Bush has pretended — and his simplicity may be doing significant damage to America in the world. The military campaign has been a success, but it is far from clear that victory in Iraq will be a net positive in the larger war on terrorism or even, ultimately, that it will be seen as an American foreign-policy success.

105. Atkins v. Virginia, 536 U.S. 304, 315-28 (2002) (considering international opinion in framing changing views on the death penalty; over the dissent of Justices Scalia, Rehnquist and Thomas, Justice Stevens's majority opinion acknowledged broad European opposition to the United States approval of the death penalty).

106. Thomas, *supra* note 94; *see also* DeYoung, *supra* note 2 (quoting Colin Powell regarding the importance of fighting the war on terror from the "highest moral plane").

107. Thomas, *supra* note 94.

above the law" while "it is 'happy enough to sit in judgment of others."[108]

Set within post-9/11 calls for national unity and the Bush administration's controversial restrictions of civil liberties of both citizens and immigrants,[109] the intensifying African American redress movement has taken hold in the American mind — reframing traditional ideas of security, liberty, and equality with new rhetoric and substance.[110] From one important perspective, the multifaceted political and economic redress movement targets American government and business not only for a debt due but also for the long-term historic, systemic terrorizing of Americans of African descent.[111] It seeks to repair the lasting harms to both African Americans and American society itself.[112]

C. *Racial Terror*

"Terrorizing" is not a term used lightly.[113] Nor is it a malapropism. Indeed, the reparations lawsuits raise and document the specter first of enslavement, forced labor, murder, lynching and dismemberment, and then of stark exclusion from quality education, jobs, housing, health care and public services, and finally of continuing institutionalized discrimination and recent backlash against limited African American civil rights and economic gains.[114] Many whites have fought

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108. *Id.* (quoting Chris Patten's comments). Recently, Nelson Mandela sharply criticized the U.S.' overall record on human rights and observed that, on its current path, the U.S. is a threat to world peace. *See* Tom Masland, *Nelson Mandela: The USA is a Threat to World Peace*, NEWSWEEK, Sept. 10, 2002, *available at* http://www.msnbc.com/news/806174.asp.

109. *See supra* notes 62-66.

110. *See supra* notes 62-66.

111. President Bush has demonstrated, however, a disregard for the reparations lawsuits and the growing movement supporting reparations through his Cabinet and administrative agency nominations. Recently, Bush nominated John Snow and William Donaldson for Secretary of the Treasury and Chairman of the Securities and Exchange Commission, respectively. As corporate executives, both approved the rejection of restitution efforts for African American slave descendents. Last year, as head of CSX railroad, John Snow signed off on a statement that asserted courtrooms were not the proper place to address reparations. William Donaldson, while still head of Aetna Inc., approved an apology for the company's nineteenth-century role in slavery; however, the statement also asserted that no further actions were required besides the apology. Pete Yost, *Nominees Hit on Reparations*, TIMES UNION (Albany, NY), Jan. 5, 2003, at C13; *see also* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996).

112. ROBINSON, *supra* note 80.

113. The term "repair" is also used carefully. It animates the concept of reparations — not as compensation but as restoration; attending both to the individualized harms and to the larger breaches in the polity. *See generally* YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 52.

114. *Id.* at 203-09. The horrific attacks on September 11th were acts of terror. The loss of life was horrendous. Those attacks, of course, were markedly different than present-day

for African American civil rights. But overwhelmingly, through laws, government policies, and business practices, whites in America historically have benefited from forms of racial terror that have been transformed into institutionalized forms of discrimination.[115]

The present-day African American reparations movement builds on this history of racial terror and ensuing segregation and discrimination.[116] It also builds on the political foundation laid by past unsuccessful reparations efforts, starting with the forty-acres-and-a-mule post-Civil War program rescinded by President Andrew Johnson and including the calls for reparations by the Reverend Martin Luther King, Jr. and James Forman in the 1960s and 1970s and the failed 1995 *Cato* class-action damages suit.[117] At the same time, the current movement, with its supporting lawsuits, bears new rhetoric, rests partially on new claims, and targets a far wider audience.

Generalizing broadly, the earlier movements tied reparations claims to the idea of equality rooted in American law and aimed at domestic audiences — American legislators and judges and the mainstream public. The current movement internationalizes African American redress. It does so explicitly by asserting international human rights claims and by linking African American redress to reparations efforts around the world.[118] It does so implicitly by broadly articulating and staunchly pressing internationalized African American reparations claims in multiple forums while the United States struggles for the moral high ground in its preemptive war on terrorism.

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discrimination against African Americans. The distinct differences, however, do not alter the reality that contemporary discrimination has deep social and institutional roots in America, including forms of racial terror sanctioned by the federal and many state governments and private businesses.

115. NAACP Board Chair Julian Bond, in his NAACP 2002 "Freedom Under Fire" Convention address, characterized slavery/segregation/discrimination as forms of terrorism:

> Just as this enemy [post-9/11] — terrorism — is more difficult to identify and punish, so is discrimination a more elusive target today. And just as we know a lot about discrimination, we know a lot about terrorism too. As Vernon Jordan said recently: "Slavery was terrorism, segregation was terrorism, the bombing of four little girls in Sunday school was terrorism. . . . And we know that the surest defense against terrorism is affirmation of America's basic values."

Julian Bond, Address at the 2002 NAACP Convention (July 7, 2002), *available at* http://www.naacp.org; *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-46 (1995) (invoking the preservation through transformation theory).

116. *See* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 836 (2002) (discussing how past Ku Klux Klan atrocities have produced a range of short- and long-term effects with intense individual, familial, communical, and societal reverberations).

117. *See* Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993) [hereinafter Verdun, *If the Shoe Fits*] (cataloging past African American reparations movements).

118. *See infra* Part IV.

In short, while focusing on domestic relief to materially benefit African Americans in need, the new face of African American reparations is globalized — not globalized as in "free trade," but globalized in terms of human rights. This internationalization of reparations places the United States among other nations searching for peace through justice in the face of compelling, and as yet unredressed, claims of historic injustice.

The pending and impending African American reparation lawsuits, and the political movement supporting them, are therefore likely to emerge as an epochal American race trial. First, they articulate a moral case for African American reparations in compelling justice terms — terms the American public has yet to fully engage; terms the American public cannot ignore. They speak cogently not only of the human horrors of slavery and the lasting economic benefits derived by whites in America, but also of the present-day social and economic consequences for African Americans of two centuries of slavery and eighty years of legalized segregation. Equally important, with the backlash against affirmative action and ameliorative race-based programs, they ask whether the United States aims to make good, or renege again, on its second promise of a genuine Reconstruction.[119]

Second, and the focus of Parts IV and V, the African American reparations claims and their increasingly internationalized framing are effectively retrying who "we" are as a people — in our own eyes and, as the government fights the war on terror, in the eyes of the world communities as they struggle to rectify historic colonial and wartime injustices. Indeed, the internationalizing of reparations is framing a distinct and potent American self-interest in reparations.

As Part V suggests, the United States may lack the unfettered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own long-term government-sponsored terrorizing of a significant segment of its populace. Pressed by the rising tide of public criticism about his administration's apparent disdain for civil liberties, President Bush implicitly acknowledged this "interest-convergence"[120] in his pre-9/11 anniversary news conference statement that "in order for us to reject what was done to America on September the 11th, we must reject bigotry in all its forms."[121]

As in the *Korematsu* trials and Japanese American redress, African American reparations claims ask multiracial America to reject

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119. *See infra* Part III.

120. *See* Bell, *Interest-Convergence Dilemma*, *supra* note 8 (advancing an interest-convergence thesis to explain civil rights gains for African Americans).

121. News Release, White House Office of the Press Sec'y, President Bush Holds Roundtable with Muslim-American Leaders (Sept. 10, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/09/20020910-7.html.

bigotry in all its forms, "to tunnel inside our souls to discover what we truly believe about race and equality and the value of human suffering."[122] And rejecting bigotry in all its forms, we submit, includes repairing the lasting wounds of historic American terror. Especially at a time when conservative politicians, lawyers, and judges have largely succeeded in dismantling the 1960s civil rights edifice, rejecting bigotry means reparation not only in the abstract but also at the ground level where racism is experienced. It also means embracing a new reparation principle: both in redressing the United States' own historic inequities and in its present-day treatment of citizens and immigrants during times of national stress and fear about security, America's long-term interests are best served when it pays careful heed to domestic civil rights and international human rights. That kind of multifaceted reparation principle, practical and conceptual, offers the nation its best, if not only, prospect of ascending to the "highest moral plane." All in America have an abiding interest in the process and outcome of the African American reparations trials.

III. THE REPARATIONS LAWSUIT

African Americans have renewed their call for reparations for the legally sanctioned harms of slavery and Jim Crow oppression. These renewed claims have gained momentum in the courts, where reparations litigation has reached a critical mass. Since last year, nine federal lawsuits have been filed by slave descendents against a growing array of American corporations.[123] The Reparations Coordinating Committee, a legal team of the nation's most prominent black attorneys and scholars, is planning another reparations suit in the coming months.[124] Another effort by the National Coalition of Blacks for Reparations in America may also result in lawsuits against the government and the private sector.[125]

Taken together, these lawsuits — in conjunction with political organizing and community education — are putting African American reparations on the national and international stage. Specifically, the suits are bringing to the public fore issues of history, collective memory, psychological healing, and institutional reordering. According to Professor Charles Ogletree, today's reparations movement seeks "to bring American society to a new reckoning with how our

122. Merida, *supra* note 1.

123. *See supra* note 17 and accompanying text.

124. *See infra* note 149 and accompanying text.

125. Deborah Kong, *Sharing the Wealth: At the Heart of the Movement Is the Idea that Modern Disparities Stem from Slavery*, SAN ANTONIO EXPRESS-NEWS, Apr. 5, 2002, at 19A (citing Adjoa Aiyetoro, NCOBRA's chief legal counsel and a member of the reparations committee).

past affects the current conditions of African Americans and to make America a better place by helping the truly disadvantaged."[126]

We focus here on two of the suits: *Farmer-Paellmann v. FleetBoston Financial Corp.*,[127] which is generally representative of the other class-action suits seeking individual damage recovery, and the impending Reparations Coordinating Committee class action for institutional restructuring through the creation of African American trust funds.[128] These two suits reflect differing philosophical and jurisprudential approaches to African American reparations claims.

A. *The Reparations Lawsuits*

1. Farmer-Paellmann *and Companion Suits*

In March 2002, New England School of Law graduate Deadria Farmer-Paellmann filed the first federal reparations lawsuit against private American corporations. Filed in New York federal court on behalf of herself and all African American slave descendants, Farmer-Paellmann's class-action complaint alleges that three companies, or their corporate predecessors, unjustly profited from slavery.[129]

The lawsuit names as defendants well-known entities FleetBoston Bank, railroad giant CSX, and insurance company Aetna, Inc. According to the complaint, FleetBoston is the successor-in-interest to Providence Bank, which financed its founder, Rhode Island slave trader John Brown.[130] CSX is the successor-in-interest to numerous railroad lines that were "constructed or run, at least in part, by slave

126. Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, at B16 [hereinafter Ogletree, *Litigating the Legacy of Slavery*].

127. No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002) *available at* http://www.pacer.psc.uscourts.gov.

128. Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126.

129. Complaint and Jury Trial Demand at 7, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002); *see also* James Cox, *Reparations Activist: "We're Still Living with the Vestiges of Slavery,"* USA TODAY, Feb. 21, 2002, at 8A [hereinafter Cox, *Reparations Activist*]. Representing the plaintiffs are Edward Fagan, of Fagan & Associates of Livingston, New Jersey; Roger S. Wareham and Jomo Sanga Thomas of Thomas Wareham & Richards of Brooklyn, New York; Bryan R. Williams of New York; Bruce H. Nagel, Jay J. Rice, and Diane E. Sammons, of Nagel Rice Dreifuss & Mazie of Livingston, New Jersey; and Morse Geller, of Forest Hills, New York. Complaint and Jury Trial Demand at 20, *Farmer-Paellmann*, No. CV-02-1862; *see also* Cox, *Activists Challenge Corporations*, *supra* note 6.

130. Complaint and Jury Trial Demand at 8-9, *Farmer-Paellmann*, No. CV-02-1862. Brown is alleged to have engaged in slave voyages financed by loans from Providence Bank. *Id.* at 8. FleetBoston also collected custom fees due from ships transporting slaves, thus making a profit from the slave trade. *Id.*

labor."[131] Aetna, Inc.'s predecessor-in-interest insured slave owners "against the loss of their human chattel."[132]

The complaint focuses predominantly on the claims of unjust enrichment and conversion under a common law individual rights and remedies paradigm.[133] According to the suit, defendants "improperly benefited from the immoral and inhumane institution of Slavery" because they "failed to account for and or return ... the value of [plaintiffs'] ancestors' slave labor" and the profits and benefits derived from that labor.[134] In addition, the complaint alleges that defendants "wrongfully misappropriated and converted the value of that labor and its derivative profits into Defendants' own property."[135] The lawsuit thus seeks an accounting of the slave-labor monies, a constructive trust, full restitution, equitable disgorgement, and compensatory and punitive damages.[136] Although the suit does not demand specific monetary damages, the complaint estimates that slaves performed as much as $40 million worth of unpaid labor between 1790 and 1860 and that the current value of that labor could be as high as $1.4 trillion.[137]

The complaint also alleges novel group-based claims and remedies, including a human rights violation count and a request for the appointment of a historic commission. The complaint asserts that defendants "knowingly benefited from a system that enslaved, tortured, starved and exploited human beings," and "in so doing furthered the commission of crimes against humanity, crimes against peace, slavery and forced labor, torture, rape, starvation, physical and mental abuse, [and] summary execution."[138] Plaintiffs' demand for an accounting entails, among other things, the disclosure of complete corporate records that reveal evidence of slave labor and "the

131. *Id.* at 9. CSX agrees that slavery was a "tragic chapter in our nation's history" but contends that the suit is without merit and should be dismissed. Corey Dade, *Fleet, 2 Other Firms Sued over Slavery; Class-Action Filings Seek Reparations*, BOSTON GLOBE, Mar. 27, 2002, at A1.

132. Complaint and Jury Trial Demand at 9, *Farmer-Paellmann*, No. CV-02-1862. Plaintiffs allege that Aetna knew the horrors of slave life because it had a rider in its policy that excluded payment for the death of slaves through lynching, overwork, or suicide. *Id.* Aetna maintains that what occurred in the past does not reflect Aetna today and supports CSX's position that the suit should be dismissed. *See* Dade, *supra* note 131. Defendants Corporate Does Nos. 1-100 may include "other companies, industrial, manufacturing, financial and other enterprises" that were unjustly enriched from slave labor. Complaint and Jury Trial Demand at 9, *Farmer-Paellmann*, No. CV-02-1862; *see also* Paul Siegel, *The Case for Reparations for African Americans*, SOCIALIST ACTION, Sept. 2000, *available at* http://www.socialistaction.org/ news/200009/case.html.

133. Complaint and Jury Trial Demand at 14-18, *Farmer-Paellmann*, No. CV-02-1862.

134. *Id.* at 18.

135. *Id.* at 17.

136. *Id.*

137. *Id.* at 4.

138. *Id.* at 16.

appointment of an independent historic commission to serve as a depository for corporate records related to slavery."[139]

The complaint begins with an expansive history to support its allegations.[140] Between eight and twelve million Africans were brought to the New World in chains during the Atlantic slave trade. They were torn from their families to work in the cotton, sugar, rice, and tobacco industries, where many suffered from severe illness, malnutrition, overwork, and death.[141] The institution of slavery "eviscerated whole cultures: languages, religions, mores, and customs, it psychologically destroyed its victims."[142] At the same time, railroads, shipping companies, the banking industry, and educational institutions benefited and profited from the exploitation of slave labor.[143]

Even after slavery's end, "the vestiges, racial inequalities and cultural psychic scars left a disproportionate number of American slave descendants injured and heretofore without remedy."[144] They were not allowed to vote and found themselves "locked in quasi-servitude, due to legal, economic and psychic restraints that effectively blocked their economic, political and social advancement."[145] As a result, the complaint alleges, African Americans suffer from long-lasting structural harms; they "lag behind whites according to every social yardstick: literacy, life expectancy, income and education."[146]

According to Ed Fagan, one of Farmer-Paellmann's attorneys, the suit is part of a larger series of lawsuits that will name sixty companies in total.[147] Six other complaints have been filed around the country, in

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139. *Id.* at 15.

140. *Id.* at 1-2. The complaint also states that slaves were shipped to the South, as well as to New York to help with the construction of a fledgling colony. These slaves in New York lived in impoverished conditions, and upon death, they were relegated to the Negro Burial Ground. Research conducted by Howard University reveals that from a sampling of those dead, forty percent were children under the age of fifteen, the common cause, malnutrition. *Id.* at 2. The complaint also alleges that money from the slave trade financed prestigious universities such as Yale University. *Id.* at 3.

141. *Id.* at 2-3.

142. *Id.* at 4.

143. *Id.* at 3-4.

144. *Id.* at 4.

145. *Id.* at 5. The complaint also describes a 1998 census report that showed twenty-six percent of African Americans live in poverty compared to eight percent of whites. In addition, the complaint alleges that less than fifteen percent of African Americans have four-year college degrees, compared with twenty-five percent of whites. Infant-mortality rates were more than twice as high as those among whites and a black person born in 1996 could expect to live, on average, 6.6 fewer years than a white person born the same year. The complaint also asserts that blacks lag behind whites in almost every material aspect of life — literacy, life expectancy, income, and education. Moreover, most African Americans come from single family homes, where the mother is the sole caretaker. *Id.* at 6.

146. *Id.* at 6.

147. Kong, *supra* note 125.

New Jersey, San Francisco, Louisiana, New York, Illinois, and Texas, charging that twelve corporations are liable based on similar claims.[148]

2. *Reparations Coordinating Committee Proposed Litigation*

The Reparations Coordinating Committee, a "dream team" of African American academics, lawyers, public officials, and activists,[149]

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148. The suits demand access to firms' records to ascertain what money was made from slavery, and the payback of illicit profits. Like *Farmer-Paellmann*, the suits claim damages, but do not list a figure. See *supra* note 17 for a full listing of the cases and their docket numbers.

In May 2002, Richard E. Barber, Sr., a descendant of an African American sharecropper, filed a reparations lawsuit in a New Jersey federal court against New York Life Insurance Co., Norfolk Southern Corp., and Brown Bros. Harriman & Co. Deborah Kong, *2nd Lawsuit Filed Asking Reparations*, WASH. TIMES, May 2, 2002, at A1. Fagan called the suit "another step in a series of upcoming political and legal moves that will address the issue of reparations for American slave descendants." *Id.* Barber characterized the suit as "as debt owed to the descendants of slaves." *Id.*

In September 2002, genealogist Antoinette Harrell-Miller and researcher Raymond Johnson filed a reparations lawsuit in Louisiana on behalf of two hundred slave descendants. Defendants include Lloyds of London; Brown Brothers Harriman & Co.; R.J. Reynolds; Liggett Group; Brown and Williamson; and three railroads, Canadian National, Norfolk Southern, and Union Pacific. Plaintiffs contend that descendants deserve compensation, if only in the form of trust funds to improve health care, education and housing opportunities. Brett Martel, *La. Residents Sue for Reparations*, BATON ROUGE ADVOC., Sept. 4, 2002, at 4B, *available at* 2002 WL 5043597. The same week, Timothy and Chester Hurdle, sons of a slave, Andrew Jackson Hurdle, filed a federal reparations lawsuit in San Francisco against twelve corporations: investment banks J.P. Morgan Chase & Co., Lehman Brothers Holdings Inc. and Brown Bros. Harriman; insurers American International Group Inc. and Lloyd's of London; tobacco and insurance conglomerate Loews Corp.; railroads Norfolk Southern Corp. and Union Pacific Corp.; textile company WestPoint Stevens Inc.; and tobacco companies R.J. Reynolds Tobacco Holdings Inc., Brown & Williamson Tobacco Corp., and Liggett Group Inc., which is now owned by Vector Group Ltd. Company records show that Brown Bros. loaned money to southern plantation owners who needed funds to buy slaves. When the planters or their banks failed, Brown Bros. took possession of the assets. Brown Bros.' local agents also ran repossessed plantations and managed the slaves working there. Cox, *Activists Challenge Corporations*, *supra* note 6.

Complementary suits were also filed by one-hundred-nineteen-year-old Edlee Bankhead in New York, and Ina Daniels-Hurdle-McGee and Julie Mae Wyatt-Kerwin in Texas. *See* Marcus Alcock, *Lloyd's Named in Slavery Lawsuit*, WASH. POST, Sept. 5, 2002 (Magazine), at P1; Bill Rigby, *12 Companies Face Slavery Suits, Reparations Sought for Pre-1865 Gains*, SOUTH FLA. SUN-SENTINEL, Sept. 4, 2002, at 5A; Erik Rodriguez, *Women Want Reparations for Slavery; Two from Dallas Announce Plans to File Lawsuit Against Three Companies Today*, AUSTIN AM.-STATESMAN, Jan. 21, 2003, at B1.

149. The committee includes: Law Professor Charles Ogletree; author-activist Randall Robinson; Professor Cornel West; attorneys Alexander Pires, Johnnie L. Cochran Jr., Willie E. Gary, Richard Scruggs, and Dennis Sweet; civil rights attorneys Adjoa Aiyetoro, Rose Sanders and J.L. Chestnut; social scientists Johnnetta Cole, Manning Marable and Ronald Walters; lecturer Richard America; psychiatrist and professor James Comer and U.S. Representative John Conyers, D-Mich. Interview with Charles Ogletree, Jr., Professor of Law, Harvard Law School, in Cambridge, Mass. (Apr. 6, 2002); *see also* Jack Hitt, *Making the Case for Racial Reparations*, HARPER'S MAG., Nov. 1, 2000, at 37; Ogletree, *The Case for Reparations*, *supra* note 77, at 6; *Reparations Coordinating Committe* [sic] *Members*, USA TODAY (Feb. 21, 2002), *at* http://www.usatoday.com/money/general/2002/02/21/slave-rcc-members.htm (listing members of the committee).

spent the last two years preparing its own reparations lawsuits.[150] According to Professor Charles Ogletree, co-chair of the Committee, the team seeks to file an "unprecedented reparations suit in the coming months that could amount to trillions of dollars."[151] Although the team has not revealed the specifics of the impending suit, it appears to depart from the *Farmer-Paellmann* framework in a number of ways.

In addition to private corporations, defendants may include state and federal governmental entities, universities, and individuals who benefited from slavery and the resultant era of legalized discrimination and subordination.[152] Possible university defendants include Brown, Yale, and Harvard, which were endowed in part by money from the slave trade.[153] For Professor Ogletree, naming the government as a defendant is vital because "public officials guaranteed the viability of slavery" and the ensuing segregation and discrimination against blacks.[154] Litigating against the government is important also because it will "generate a public debate on slavery and the role its legacy continues to play in our society."[155]

Team members are contemplating a variety of legal claims. The first is a breach of contract claim reaching back to the broken promise of forty acres and a mule.[156] Another is a "taking" claim under the Fifth Amendment based on the government's seizure of the "forty acres and a mule" received by 40,000 blacks in Florida and South Carolina.[157]

Yet another is a due process claim under the Fourteenth and Fifth Amendments against the federal government for the "failure to enact

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150. The legal team works on a volunteer basis. Ogletree, *The Case for Reparations*, *supra* note 77, at 7.

151. *Id.* at 6. As this Essay was in press, the Reparations Coordinating Committee filed the first of its reparations suits in federal court in Oklahoma, seeking individual damages and the creation of an educational trust fund for survivors of the 1921 "Tulsa Race Riots." *See* Alexander v. Governor of Okla., Case No. 03-CV-133 E(c) (N.D. Okla. filed Mar. 20, 2003). *See generally* James S. Hirsh, *Can Justice Be Done in Tulsa?*, WASH. POST, Mar. 16, 2003, at B2; *supra* note 84.

152. *See* Alex P. Kellogg, *Talking Reparations with Charles Ogletree*, AFRICANA.COM, Aug. 28, 2001, *at* http://www.africana.com/dailyarticles/index_20010828_1.htm; *see also* Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126.

153. Among the companies identified by the team as having ties to slavery are insurers New York Life, Aetna, AIG and financial giants J.P. Morgan Chase Manhattan Bank and FleetBoston Financial Group. *See* Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126.

154. *Id.*

155. *Id.*

156. Hitt, *supra* note 149, at 39. The pledge of "a plot of not more than (40) forty acres of tillable ground" was set forth in Special Field Order No. 15, issued by General William Sherman, sanctioned by Congress, but rescinded by President Andrew Johnson. *See* Ogletree, *The Case for Reparations*, *supra* note 77, at 7; *see also* Hitt, *supra* note 149, at 44.

157. Hitt, *supra* note 149, at 40.

sufficient laws to ensure due process or for passing laws that perpetuated injustice."[158] According to members of the team, this kind of due process suit might be most effective in remedying past wrongs because instead of awarding a windfall to individuals, it creates structural changes for future generations.[159] The ultimate goal would be the passage of federal legislation to rectify the imbalances created as a result of prior governmental actions.[160]

In terms of strategy, the team is considering filing a web of lawsuits against the federal government, state governments, and private individuals and companies. According to team member Alexander J. Pires Jr., along with a strong political movement, a public-relations campaign, and a national audience, this slew of claims should make it difficult for a judge to ignore African American reparations.[161] Additionally, the filing of numerous suits backed by both blacks and whites will likely affect public attitudes and possibly compel Congress to deal with reparations for slavery.

Rather than remedies[162] in the form of individual payments, the team aims to secure a trust fund that administers money received through its claims, and an independent commission to distribute those funds to the poorest members of the black community, where damage has been most severe.[163]

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158. *Id.* at 48.

159. *Id.* at 49.

160. *Id.* This last claim may overcome the statute of limitations problem if it is framed as a "continuing constitutional violation." *Id.* at 50.

161. *Id.* at 40.

162. Kong, *supra* note 125.

163. Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126. These domestic cases are further complemented by reparations lawsuits filed on behalf of victims of the apartheid regime in South Africa. The first lawsuit, filed in June 2002, sought $50 billion from the American bank Citigroup, and Swiss banks, Credit Suisse and UBS. Now the suits cover collectively about thirty corporations. *See, e.g.*, *In re* South African Apartheid Litig., 238 F. Supp. 2d 1379 (J.P.M.L. 2002); Khulumani v. Barclays Nat'l Bank, Ltd., No. CV-02-5952 (E.D.N.Y filed Nov. 11, 2002), *available at* http://www.cmht.com/casewatch/cases/apartheid-cmpl.pdf; Lynne Duke, *The Price of Apartheid; In Human Terms, South Africa's Repressive System Cost Dearly. Some Victims Want U.S. Corporations to Pay*, WASH. POST, Dec. 3, 2002, at C01. The plaintiffs allege that these corporations facilitated and perpetuated the apartheid regime in South Africa. For example, the plaintiffs claim that banks like Citigroup, which extended credit to South Africa, made possible the expansion of the government's repressive security system. *Id.* One of the four plaintiffs in the suit is Lulu Petersen, the sister of Hector Petersen, killed by police in South Africa during the anti-apartheid Soweto Uprising twenty-six years ago. Southern Africa Documentation and Cooperation Centre, *Apartheid Victims' Lawyer Files Lawsuit Against IBM, German Banks*, July 1, 2002, *available at* http://www.sadocc.at/news2002/2002-223.shtml. The three other named plaintiffs are Sigqibo Mpendulo, Lungisile Ntsebeza, and Themba Makubela. Plaintiffs' team of American and South African attorneys includes Ed Fagan, Dumisa Ntsebaze, John Ngcebetsha, and Gugulethy Madlanga. According to Petersen, the plaintiffs "want reparations from those international companies and banks that profited from the blood and misery of our fathers and mothers, our brothers and sisters." *Id.* U.S.-based computer giant IBM, and three

B. *Individual vs. Group Claims*

The current and potential suits discussed above — and the reactions generated by them — put racial justice on trial. The full harm of slavery is perhaps the most unacknowledged story in America's history.[164] These suits go beyond domestic individual rights and remedies to spur larger public debates about this unacknowledged history. With different philosophical and jurisprudential approaches, the suits also raise the possibility of institutional restructuring, psychological healing, and the transformation of social relationships. As discussed below, they may also place the international spotlight on how the United States deals with its own human rights abuses.[165]

As Professor Eric Yamamoto observed in an earlier work,[166] African Americans seeking reparations for slavery in past cases have tended to frame arguments according to traditional individual rights and remedies law — that reparations are a form of both payment for individual losses (just compensation) and divestiture of ill-gotten gain (preventing unjust enrichment). At first glance, this resort to traditional legal remedies makes sense. Compensation and unjust enrichment are well-recognized remedial principles in American law, and they generally appear to fit the circumstances of African American slavery-based claims.[167]

The use of this traditional framework, however, has erected high barriers for reparations claims to confront.[168] Some of these barriers include:

> (1) the statute of limitations ("this all happened over one hundred years ago"); (2) the absence of directly harmed individuals ("all ex-slaves have been dead for at least a generation"); (3) the absence of individual perpetrators ("white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers [sic]"); (4) the lack of direct causation ("slavery did not cause the present ills of African American communities"); (5) the in-

German banks, Deutsche Bank, Dresdner Bank, and Commerz Bank were added to the suit in July. *Id.*; *see also* Ogletree, *The Case for Reparations*, *supra* note 77.

164. In a roundtable discussion focusing on the strategy for an African American reparations lawsuit, one of the attorneys for the Reparations Coordinating Committee, Alexander Pires, stated: "Slavery's the most unacknowledged story in America's history." Hitt, *supra* note 149, at 38. Another attorney for the Committee supported Pires's statement by referring to the nation's capital: "Nearly every brick, every dab of mortar, was put there by slaves. There's not a plaque in all of Washington acknowledging that slaves built the Rome of the New World. This is how it is with slavery. We've heard of it, but we don't really know anything about it." *Id.*

165. *See infra* Part IV.

166. Yamamoto, *Racial Reparations*, *supra* note 4.

167. *Id.* at 488.

168. *See id.*

determinacy of compensation amounts ("it is impossible to determine who should get what and how much");[169]

(6) and sovereign immunity (where the claims seek damages from government).[170]

These insights point toward a political reframing of the prevailing reparations paradigm — a new framing embracing the notion of reparations as "repair." Reparation in singular means the act or process of repair. Rooted in the broader idea of restorative justice, it encompasses both acts of repairing damage to the material conditions of racial group life — distributing money to those in need and transferring land ownership to those dispossessed, building schools, churches, community centers, and medical clinics, creating tax incentives and loan programs for businesses owned by inner-city residents — and acts of restoring injured human psyches, enabling those harmed to live with, but not in, history. Reparations as collective actions foster the mending of tears in the social fabric, the repairing of breaches in the polity.[171]

This repair paradigm of reparations does not rely on individual rights and remedies and focuses instead on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease — a breach in the polity. Within this framework, reparations by the polity and for the polity are justified on moral and political grounds — healing social wounds by bringing back into the community those wrongly excluded.[172]

Will this reframing of reparations legal claims gain traction with the courts? While the Supreme Court has recognized group-based rights in some constitutional cases[173] and has approved broad equitable power for federal district courts to supervise discrimination remedies,[174] the Court has not moved away jurisprudentially from traditional compensatory justice toward restorative, or repair-based,

169. *Id.* at 491 (quoting Verdun, *If the Shoe Fits*, *supra* note 117, at 607).

170. *Id.* at 491, 507.

171. *Id.* at 518-19.

172. In addition, coupled with acknowledgment and apology, reparations are potentially transformative because of what they symbolize for both bestower and beneficiary: reparations "condemn exploitation and adopt a vision of a more just world." *Id.* at 520 (quoting Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 394 (1997)).

173. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (recognizing "discrete and insular minorities" as a group needing special judicial solicitude).

174. *Id.*

justice. Nevertheless, as developed in Part IV, deploying the repair paradigm to augment the individual rights and remedies approach, particularly in the context of international human rights claims and remedies, may prove effective strategically because lawsuits, and the cultural performances they engender, often influence larger political movements, which in turn affect the suits' outcomes.

1. Farmer-Paellmann *and Companion Suits*

On its face, the *Farmer-Paellmann* complaint is cast in large part within a traditional legal paradigm. It names individual wrongdoers, Aetna, CSX, and FleetBoston, as defendants.[175] It identifies specific acts by linking each defendant to slave trading and to receiving profits from that trading[176] and alleges traditional common law claims, such as unjust enrichment and conversion.

The suit, however, also incorporates aspects of group-based remedies and, as discussed below, globalizes African American reparations by integrating international legal norms and rhetoric.[177] It sets forth a broad history of how African Americans were harmed as a group, how slavery destroyed "whole cultures: languages, religions, mores, and customs,"[178] and how racial inequalities and cultural psychic scars leave a disproportionate number of present-day African Americans injured and without remedy.[179]

The suit also evokes a group-based remedy by demanding full disclosure and the appointment of an independent historic commission.[180] Any damages obtained go not to individuals but to African Americans as a group.[181]

Much of the public commentary by those involved in the case frames the issue as one of group harms and remedies.[182] Deadria

175. Complaint and Jury Trial Demand at 1, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002).

176. *Id.* at 8-9.

177. *See infra* Part IV.

178. Complaint and Jury Trial Demand at 4, *Farmer-Paelmann*, No. CV-02-1862.

179. *Id.* at 4-9.

180. *Id.* at 15.

181. According to Roger Wareham, one of Farmer-Paellmann's attorneys, any "damages [won from the lawsuit] would be put into a fund to improve health, education and housing opportunities for blacks. . . . This is not about individuals receiving checks in their mailbox." Tony Pugh et al., *Slavery Suits Filed; More on the Way*, SEATTLE TIMES, Mar. 27, 2002, at A1.

182. Opponents of reparations have voiced familiar objections. *See supra* text accompanying notes 168-170. Reparations proponents generally have been supportive of the filings. Some reparations supporters have expressed strategic concerns — that the suits were lodged without sufficient coordination with other reparations groups and without a strong foundation of public support generated through prior political educational efforts. *See supra* notes 171-172 and accompanying text.

Farmer-Paellmann points out that the quest for reparations "torments a lot of African Americans. And it's not because of the money. Our ancestors were kidnapped, whipped, tortured, forced to breed."[183] The plaintiffs in the suits "are not looking for personal settlements,"[184] but seek instead "a humanitarian trust fund, to be used to deal with the vestiges of slavery that 35 million African Americans still suffer from, like housing, education and economic development in our communities."[185]

2. *Reparations Coordinating Committee Proposed Litigation*

Like *Farmer-Paellmann*, the impending Reparations Coordinating Committee suit will likely operate to some degree within a traditional legal paradigm. Team members indicate that unjust enrichment, the taking of property, and breach of contract may be key claims in the litigation.[186] Committee members, however, have pointed to a much larger goal: a broader inquiry into historical and present-day racial justice in America. As Professor Ogletree has observed, "A full and deep conversation on slavery and its legacy has never taken place in America; reparations litigation will show what slavery meant, how it was profitable and how it has continued to affect the opportunities of millions of black Americans."[187]

The potential claims and remedies evoke the group-based notion of "repair." A due process claim aims to compel long-term institutional reordering rather than an immediate monetary payoff.[188] The remedy sought — a trust fund and an independent commission to administer funds — also directs the remedy to the group. According to team members, rather than securing payments to individuals,[189] the

183. Cox, *Reparations Activist*, *supra* note 129.

184. Rigby, *supra* note 148.

185. *Id.*; *see also* Duncan Campbell, *Descendants of US Slaves Sue Firms for Unpaid Work*, GUARDIAN (London), Sept. 5, 2002, at P12. Plaintiffs in companion cases echo these sentiments. The Hurdles, who filed a companion lawsuit in San Francisco, remarked that they filed their lawsuit to "try to make a better future for the youth [who] . . . still endure the ills caused by slavery — including poverty and high imprisonment rates. 'I don't want a penny out of anything,' . . . . 'What I'd like to see is something done to help the future generations of our race.' " Associated Press, *For Future Generations*, S.F. EXAMINER, Sept. 9, 2002, *available at*.http://www.examiner.com/headlines/default.jsp?story=n.slave.0909w. On the other hand, Farmer-Paellmann characterized the suit as " 'ha[ving] nothing to do with individual Americans,' . . . . 'It is purely African Americans and the corporations that exploited our ancestors. And that's it. It's as simple as that.' " Kevin Canfield, *A Matter of Justice for Blacks; Slavery Reparations Team is Confident, Despite Scholars Who Say Odds Are Slim*, HARTFORD COURANT, Apr. 2, 2002, at D1.

186. Interview with Charles Ogletree, Jr., *supra* note 149.

187. Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126.

188. *Id.*

189. According to Ogletree, reparations cases should not be viewed as merely individual claims. Instead, they should follow the pattern of the Holocaust lawsuit, where "the Swiss . . .

Committee seeks to focus on repairing damage where damage is most severe.[190] As Professor Ogletree observed, "[t]he damage has been done to a group — African American slaves and their descendants — but it has not been done equally within the group. The reparations movement must aim at undoing the damage where that damage has been most severe and where the history of race in America has left its most telling evidence.... The reparations movement must therefore focus on the poorest of the poor...."[191] Therefore, the Committee seeks to establish a trust fund and an independent commission to distribute those funds to the neediest members of the black community.[192]

Indeed, the Committee has begun to publicly recast the reparations debate in terms of repair. Randall Robinson, co-chair of the team, has described reparations "as a measure of repair, as opposed to restitution to people of what was lost in income."[193] According to Professor Ogletree, the goal of the lawsuit is to 'repair' — to create a trust fund to help the most disadvantaged African Americans.[194] He also recognized that repairing the tears in the social fabric will benefit the nation as a whole: "Underlying this movement is a unifying princi-

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acknowledged individual victims but they also acknowledged the impact on greater communities, [not just] the individuals who were direct victims involved.... And I think that this situation is in no material respects really different." Kellogg, *supra* note 152.

190. Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126; *see also* Westley, *supra* note 92, at 466 ("[B]lacks deserve reparations... because they face this oppression as a group, they have never been adequately compensated for their material losses due to white racism, and the only possibility of an adequate remedy is group redress."); Cox, *Reparations Activist*, *supra* note 129.

191. Ogletree, *Litigating the Legacy of Slavery*, *supra* note 126 (arguing that reparations must "finance social recovery for the bottom-stuck, providing an opportunity to address comprehensively the problems of those who have not substantially benefited from integration or affirmative action").

192. Ogletree, *The Case for Reparations*, *supra* note 77, at 7. Early on, the legal team differed in opinion regarding the framing of the lawsuit in many areas, especially damages. Some advocated strongly for education and discouraged purely monetary awards, while others believed in the necessity of monetary awards. *Id.*; *see also* Cox, *Activists Challenge Corporations*, *supra* note 6.

193. Kong, *supra* note 125. Richard America, a member of the Committee, suggested that "some federal tax revenues should be directed to help blacks buy houses, fund education and buy or expand businesses. Reparations should focus on the poorest blacks, though all are entitled to reparations." *Id.*

194. Ogletree, *The Case for Reparations*, *supra* note 77, at 6-7; *see also* Hitt, *supra* note 149, at 45-46.

> Reparations doesn't mean just a bunch of cash payments. The word means "to repair." I'm talking about programs. Straight-out payments will create the excuse for future Congresses to say, "We've done it, and what did they do with the money? They went through it; they blew it like other groups have."

Id. (quoting Richard F. Scruggs).

ple we can't continue to ignore: This is about making America better, by helping the truly disadvantaged."[195]

The domestic civil rights landscape has provided the impetus for an increasingly potent African American reparations movement generally and these suits particularly. Conservative think tanks, advocacy groups, and politicians have stepped up the assault on civil rights legislation and antidiscrimination law.[196] Broadly stated, this accelerated dismantling of civil rights by conservatives and the cutbacks of civil rights and social programs for blacks[197] have been roughly paralleled by the intensifying of the African American reparations movement. While no direct correlation has been empirically established, it appears that the two trends are deeply connected. The crucial point of connection is justice for African Americans rooted in current social and economic conditions and the injustice of slavery, Jim Crow segregation, and present-day institutionalized forms of discrimination.[198]

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195. Ogletree, *The Case for Reparations*, *supra* note 77, at 7; *see also* Hitt, *supra* note 149, at 44.

> It would say that America stepped up to the plate and acknowledged its wrongdoing and reached out to the people and said there is justice for all, it would change things — the way you and I see each other. It would be nice, you know, sometime to sit down together, and you say "I'm sorry" and I say "I'm sorry," and then we could just break bread together. We can go forward, we can do greater things than we ever anticipated.

Id. (quoting Willie E. Gary).

196. *See generally* DINESH D'SOUZA, THE END OF RACISM (1995) (asserting that racism has ended and that therefore there is need for civil rights laws); Center for Individual Rights, No Retreat: The Alamo of Affirmative Action, *at* http://www.cir-usa.org/recent_cases/michigan_background.html (last revised Nov. 25, 2002) (criticizing all race- and gender-based programs and advocating that they be dismantled).

197. *See supra* note 86 and accompanying text. *See generally* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL INJUSTICE IN AMERICAN THOUGHT AND POLICY (1995) (describing the backlash against affirmative action and other social programs for racial justice).

198. The United States first promised real equality to African Americans following the Civil War — the First Reconstruction. The mid-1860s First Reconstruction provided a foundation for universal civil and political freedom throughout the United States. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1st ed. 1989). The Civil Rights Acts and the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were the centerpieces of a Reconstruction whose clear legislative and popular purpose was to uplift blacks from two hundred years of systemic subordination in America. *See* Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1930-37 (2000) [hereinafter Harris, *Equality Trouble*] (describing the legal structure and subsequent dismantling of the First Reconstruction as historical context for the thesis that a constant tension in American race law has been the effort to reconcile constitutional and statutory norms of equality with the desire for white dominance). Newly freed African Americans began to make real political and economic gains.

Pressured by rebellious Southern states and worried Northerners, however, the federal government quickly revoked its promise. *See* BELL, *supra* note 69, at 59-62. The civil rights laws adopted as the foundation of the Reconstruction were torn apart by court rulings, massive political resistance, and a lack of public will. *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 390 (1978) (Marshall, J., dissenting) ("The combined actions and inac-

tions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War."); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1st ed. 1955) (reporting that the period from 1890 to 1910 witnessed a steady rise of state Jim Crow statutes in both the North and the South); Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 11 (1985) (noting that in 1894, Congress repealed thirty-nine sections of the civil rights voting laws); John Hope Franklin, *History of Racial Segregation in the United States*, in ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1956, at 1 (discussing how discriminatory state laws called for segregation in virtually all aspects of society). Reconstruction was dismantled by a combination of factors: popular white backlash, *see* BELL, *supra* note 69, at 56, 59-61; lack of presidential and congressional will (for example, the 1872 Hayes-Tilden presidential compromise in which the Republicans agreed to withdraw federal troops from the South), *see generally* BELL, *supra* note 69, at 54; and the imprimatur of Supreme Court decisions, *see, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (ruling that Congress had no authority to ban discrimination in public accommodations and striking down the Civil Rights Act of 1875). Ruling by ruling, the Court gutted explicit civil rights protections for blacks. *See Bakke*, 438 U.S. at 391-92 (Marshall, J., dissenting) (summarizing the Supreme Court's sharp curtailment of the Civil War Amendments' substantive protections); Blackmun, *supra*, at 10 ("By the Court's decisions, major provisions of the Acts either were declared unconstitutional or were emasculated."). The Court defined the Reconstruction Amendments in the narrowest possible fashion and often refused to recognize other civil rights at all. *See* Plessy v. Ferguson, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883) (striking down the Ku Klux Klan Act of 1871 on the grounds that protection of individuals from private conspiracies is a state, not a federal, function); United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Reese, 92 U.S. 214 (1876); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Finally, when the Court did acknowledge African American "political" rights, such as the right to vote, and found those rights violated by the states, it declined to enforce them. *See* Giles v. Harris, 189 U.S. 475 (1903) (determining that a court of equity could not enforce political rights and denying the request for an injunction to require Alabama to permit six thousand blacks to vote). Significantly, the Court signaled that it would abdicate authority over civil rights to the states with disastrous results. *See The Civil Rights Cases*, 109 U.S. at 57 (Harlan, J., dissenting) (arguing that if "the obligation to protect the fundamental privileges and immunities granted by the Fourteenth Amendment to citizens residing in the several States, rests primarily, not on the nation, but on the States . . . we shall enter upon an era . . . when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.")

The Court, in concert with intractable white resistance, ushered in state law regimes of de jure Jim Crow segregation and contributed to the rise of the Ku Klux Klan and unchecked racial violence. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896); *see also* United States v. Price, 383 U.S. 787, 804-05 (1966) (discussing the rise of white supremacy groups, such as the Ku Klux Klan); Berea Coll. v. Kentucky, 211 U.S. 45 (1908) (upholding statute subjecting a private college to a heavy fine for admitting both white and black students); Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899) (refusing to reinstate injunction prohibiting state board from collecting school tax levies for the maintenance of a high school system that solely benefited whites until equal facilities were provided for African American students). The result: post-Civil War Reconstruction laws that were on the books but without practical force, and continuing systemic subordination of African Americans. This meant exclusion from schools, workplaces, housing, social services, and politics, as well as the badge of racial inferiority. For African Americans, there was no steady post-Civil War upward pull toward equality. BELL, *supra* note 69, at 58. Indeed, the briefest bright moment of Reconstruction gave way to eighty years of social, economic, and political darkness — America's First Broken Civil Rights Promise.

In the 1960s, the United States acknowledged its failed first promise of Reconstruction. After sustained African American protests against segregation, once again the nation committed itself to equality and justice both through new laws and reinvigorated older ones (including the Fourteenth Amendment and 42 U.S.C. § 1983) that, for a time, the courts vigorously enforced. *See* U.S. CONST. AMEND. XIV, § 1; Civil Rights Act of 1870, 16 Stat. 144

Important reparations groundwork has already been laid, with some important successes. For over twenty-five years, reparations claims and race-related apologies have marked state and federal terrain.[199] But now, in the face of widening inequalities, narrowing civil rights protections, and the challenge to affirmative action,[200] African American reparations claims have gained crucial momentum.

(1870). The new laws included Title VII (employment), Title VI (federal contractors), Title II (public accommodations), and Title IX (gender) of the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (2000)); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb (2000)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2000)). These new laws also supported affirmative action in order to begin to level a grossly unequal playing field. Collectively, the Court's rulings during this period provided judicial legitimacy to congressional and executive actions protecting the civil rights of racial minorities and reinforced the legal foundation of the Second Reconstruction. (In 1961, for example, President Kennedy signed an executive order, which compelled contractors with the federal government to do more than ensure "equal opportunity" — it required them "to take 'affirmative action' to ensure that discrimination did not occur.") Harris, *Equality Trouble*, *supra*, at 1995. A Second Reconstruction, and real progress for African Americans, began to take hold.

The legal reforms and social movements that comprised the Second Reconstruction resulted in significant changes for African Americans, Latinos, Asian Americans, women, and immigrants. These changes included expanded job opportunities, increased access to education, a decrease in state-sponsored racial violence, immigration reform that offered citizenship to many nonwhites, and a moratorium on the application of the death penalty. *See, e.g.*, Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of "Preferential Treatment,"* 16 NAT'L BLACK L.J. 127, 131-32 (1999-2000) (reporting that "the proportion of employed Blacks who hold middle class jobs rose from 13.4 percent in 1960 to 37.8 percent in 1981 . . . [and that] [t]he number of Black college students rose from 340,000 in 1966 to more than one million in 1982" (citing ROBERT BLAUNER, BLACK LIVES, WHITE LIVES: THREE DECADES OF RACE RELATIONS IN AMERICA (1989))); Harris, *Equality Trouble*, *supra*, at 1991-92 (observing that "(t)he fall of Jim Crow was accompanied by new constitutional restrictions on the power of the police to maintain racial order . . . . These restrictions on police discretion made it increasingly difficult for the police to act as the enforcement arm of white supremacy"); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 80-81 (1995) (discussing the impact of the 1965 repeal of national origin quotas in U.S. immigration law on the racial and ethnic communities of the U.S. (citing inter alia, U.S. DEP'T OF JUSTICE, 1992 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 27-28 (1993))); U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000), at 4 (2000) (stating that "[t]he Supreme Court issued a ruling in 1972 that had the effect of invalidating capital punishment throughout the United States — both in the federal criminal justice system and in all the states that then provided for the death penalty" (referring to Furman v. Georgia, 408 U.S. 238 (1972))), *available at* http://www.usdoj.gov/dag/pubdoc/dpsurvey.html.

But then, as before, came a cultural and political backlash against the gains by minorities, women, and immigrants, followed by the tide of court decisions dismantling civil rights. *See* Crenshaw, *supra* note 86. "Civil rights retrenchment" has been marked by successful direct challenges to federal civil rights legislation and constitutional protections, and by indirect challenges to federal authority over the states — the old states' rights argument dressed in new clothes. What was once an aggressive legal commitment to civil rights enforcement has become, in the eyes of many subordinated Americans, another Broken Promise. *See id.*

199. Yamamoto, *Racial Reparations*, *supra* note 4.

200. *See* Westley, *supra* note 92, at 338 (arguing that demise of affirmative action requires renewed focus on African American reparations).

Will the racial reparations cases, as legal team members hope, bring an increased awareness among all people of the wrongs done?[201] The cases are ongoing and their outcomes and social and political impacts are yet to be determined. What is clear is that the lawsuits promise to reframe the way national and international communities view American racial justice under law.[202] As Representative Bobby Rush aptly observes, "[t]he future of race relations will be determined by reparations for slavery."[203]

IV. AFRICAN AMERICAN REPARATIONS, INTERNATIONAL HUMAN RIGHTS, AND THE WAR ON TERROR

What is at stake in the African American reparations suits? Potential recovery of millions, and perhaps billions, of dollars in damages. A public "fact finding" commission. The creation of trust funds for education, health care, housing, and business enterprises.[204] These stakes are important for African Americans and are in certain respects monumental for American society, as they may bear on America's standing as a just nation in the eyes of world communities.

With this in mind, our focus for the remainder of this Essay is on the internationalizing of African American redress. Building on the opening Part's general discussion of the international setting for African American reparation claims, this Part first looks at the United States' controversial pull out from the 2001 United Nations Conference on Racism in Durban, South Africa, in part in fear of a collective call for reparations for slavery. Leaders from myriad countries and human rights organizations condemned the United States' refusal to participate.

This Part then examines the ensuing reparations lawsuits and the internationalization of African American redress. In broad terms, it assesses the impact of this "globalization" on the suits themselves, including their American-law and international-human-rights claims, and on their connection to America's standing to wage the war on

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201. David Johnson, *Activist Calls for Debt Relief, Reparations*, AFRICANA.COM, *at* http://aolsvc.peopleconnection.africana.aol.com/archive/dailyarticles/index_20000229.asp (last visited Feb. 2, 2003) (stating that rather than "seeking an actual award of money[,]" he hoped for "more social programs to help the segment of black America that remains mired in poverty . . . '[M]oney should be spent to upgrade poor schools and provide greater social services.' ").

202. Kong, *supra* note 125 (quoting civil rights attorney and reparations-committee member J.L. Chestnut, Jr., as saying, "A lawsuit is merely the legal side of the struggle to bring the whole question of slavery to the surface").

203. Kimberly Hohman, *Slavery Reparations: History, Background Information and Current Events on Slavery Reparations*, ABOUT.COM., *at* http://racerelations.about.com/library/weekly/blreparations.htm (last visited Feb. 2, 2003).

204. Farmer-Paellman v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002), *available at* http://www.pacer.psc.uscourts.gov.

terrorism in a manner that undermines the civil liberties of both Americans and immigrants and disregards racial and religious harassment. To make this assessment, this Part draws upon Derrick Bell's interest-convergence thesis that posits that substantial advances in African American civil rights are made only if government leaders and the mainstream American public perceive a direct self-interest in those gains. It looks at what mattered significantly to the United States fifty years ago on the eve of *Brown v. Board of Education* — that its moral authority and international standing to wage the Cold War in the interest of national security were being undermined by the failure to rectify civil rights violations at home.[205]

In light of these assessments, the Essay concludes by reframing distinctly American interests in African American reparations — that is, reparations not just as compensation for past debts, but rather as "repair" of both the lasting harm to many individual African Americans and the deepening tears in America's moral fabric. In so concluding, the Essay offers an important caveat about the danger of loosely linking reparations to moral authority to wage war; it thus suggests a tightly cast reparations principle grounded in civil and human rights to guide current and future global reparations efforts.

A. *Reparations on the International Table? The United States Opts out of the United Nations Conference on Racism*

The year 2001 marked the International Year of Mobilization Against Racism.[206] Groups from around the world traveled to Durban, South Africa for the World Conference Against Racism.[207] The participants worked toward a "non-binding declaration . . . intended to advance the commitment of governments around the world to the elimination of racism and related intolerance and to lay out concrete steps to help reach that goal."[208] What began as a monumental effort, however, quickly clouded with political smoke. The United States' decisions to withdraw completely from the conference and then, after

205. *See infra* Part IV.2.

206. *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August-8 September 2001*, U.N. Office of the High Commissioner for Human Rights, U.N. Doc. A/Conf.189/12 (Jan. 25, 2002) [hereinafter *Report of the World Conference Against Racism*], *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.conf.189.12.EN?Opendocument.

207. *Id.*

208. *A Discussion on the U.N. World Conference Against Racism: Hearing Before the House Subcomm. on Int'l Operations & Human Rights of the House Comm. on Int'l Relations*, 107th Cong. 29 (2001) [hereinafter *A Discussion on the U.N. World Conference Against Racism*] (statement of William B. Wood, Principal Deputy Assistant Secretary, Bureau of Int'l Organization Affairs, U.S. Dep't of State), *available at* http://wwwa.house.gov/ international_relations/107/74408.pdf.

harsh criticism, to send a low-level delegate triggered worldwide opprobrium.[209]

Initially, the United States intended to send Secretary of State Colin Powell as its representative.[210] For many organizers and participants, this showed that the United States meant business.[211] To their later dismay, the administration pulled Secretary Powell out of the conference completely before it started.[212] The administration offered two explanations. First, it said that preliminary conference documents equated Zionism with racism and that this "hateful language" was directed at Israel, an important American ally.[213] To accommodate the United States' position, conference organizers removed the offending language from the program table. This highlighted the second and remaining reason for American withdrawal — the conference's consideration of the issue of reparations for slavery.

National Security Advisor Condoleeza Rice remarked that "slavery is more than 150 years in the past and of course there is a continuing stain . . . but we have to turn now to the present and to the future."[214] The State Department opposed slavery reparations because of "unpredictable effects."[215]

> The U.S. has consistently opposed the call for reparations for a variety of reasons, and will continue to do so. There is no consensus in the U.S. on payment of reparations. It is not clear what would be the legal or practical effect of a call of reparations for injustices more than a century old. Nor is it clear that such a call would contribute to eliminate racism in the contemporary world.[216]

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209. *See infra* notes 217-223 and accompanying text.

210. *S. Africa Trying to Revive U.N. Racism Meeting*, CNN.COM, Sept. 4, 2001, *at* http://www.cnn.com/2001/ WORLD/africa/09/03/racism.conference [hereinafter *S. Africa Trying to Revive U.N. Racism Meeting*].

211. *See infra* notes 220-222 and accompanying text.

212. *Charlayne Hunter-Gault: Racism Conference's Outcome Uncertain*, CNN.COM, Aug. 31, 2001, *at* http://www.cnn.com/2001/WORLD/africa/08/31/hunter_gault.debrief.otsc/index.html.

213. *S. Africa Trying to Revive U.N. Racism Meeting*, *supra* note 210; *see also New Racism Declaration Unveiled*, CNN.COM, Sept. 4, 2001, *at* http://www.cnn.com/2001/WORLD/africa/09/04/racism.main ("The World Conference recognises [sic] with deep concern the increase of racist practices of Zionism and anti-Semitism in various parts of the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas, in particular the Zionist movement, which is based on racial superiority."). The U.S. unsuccessfully negotiated for the removal of this language. Elise Labott, *Powell Skipping U.N. Racism Conference*, CNN.COM, Aug. 28, 2001, *at* http://www.cnn.com/2001/US/08/27/powell.un.race.

214. Beijing News, *Durban Racism Conference: "Wasted" Time: Condoleeza Rice*, ENORTH.COM.CN, Sept. 9, 2001, *at* http://english.enorth.com.cn/system/2001/09/10/000139317.shtml.

215. *A Discussion on the U.N. World Conference Against Racism*, *supra* note 208, at 29 (statement of State Department official William B. Wood).

216. *Id.* (statement of State Department official William B. Wood).

The Bush administration's decision to pull out, and its tepid explanation for doing so, faced criticism on all fronts. Some called it "shameful and immature."[217] Others labeled it unprincipled. "What is most disappointing is that the U.S. government refused to participate based on the very principles that (America) was built on, and that is freedom of expression."[218] The "U.S. government refused to acknowledge that people have the right to disagree . . . and instead it is just giving up."[219]

Others took an even harsher view. They viewed the administration's conduct as duplicitous — as hiding its enmity toward African American slavery reparations. "This is going to be a big disappointment for victims of racism everywhere in the world. The United States is using a political smoke screen to avoid dealing with the many very real issues at this conference."[220] Essop Pahad, South African Minister of the Presidency, predicted that: "the USA's withdrawal from the conference [will be perceived as] merely a red herring demonstrating an unwillingness to confront the real issues posed by racism in the U.S. and globally."[221] Nongovernmental-organization delegates from the U.S. concluded that the U.S. government "is trying to deflect attention from its own race problems. 'I think a lot of the talk about Israel is camouflage for the government not wanting to talk about reparations for slavery.' "[222] A civil rights group observed that in preconference program negotiations,[223] "America spent its time challenging nearly every word of the text, objecting to language that might actually require it to take actual steps to combat racism or acknowledge that slavery was a crime against humanity."[224]

In reaction to the outpouring of criticism, from widely varying groups, with disparate messages, the United States in the end opted

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217. Anastasia Hendrix, *S.F. Delegates Disappointed by U.S. Exit*, S.F. CHRON., Sept. 5, 2001, at A8. Hundreds of protesters gathered outside the Durban conference center chanting "Shame, shame, U.S.A." Chris Tomlinson, *U.S. Pulls out of Talks on Racism*, SEATTLE POST-INTELLIGENCER, Sept. 4, 2001, at A1.

218. Hendrix, *supra* note 217 (quoting Krishanti Dharmaraj, executive director of the Women's Institute for Leadership Development in San Francisco).

219. *Id.*

220. Tomlinson, *supra* note 217.

221. *New Racism Declaration Unveiled*, *supra* note 213.

222. Hendrix, *supra* note 217 (quoting Wilson Riles, San Francisco Regional Director of the American Friends Service Committee). The Conference adopted documents that addressed slavery as a crime against humanity. The Adopted Declaration acknowledged that nations, including the United States, that participated and benefited from the Transatlantic Slave Trade were obligated to find appropriate ways to restore dignity to victims and ensure access to justice. Restoring dignity and ensuring access to justice included the right to seek just and adequate reparation. *Report of the World Conference Against Racism*, *supra* note 206.

223. Hendrix, *supra* note 217.

224. *Id.*

for minimalist participation in the conference. It sent a low-level government official to the Conference in Colin Powell's place.[225] Layered on top of its perceived anti-civil rights stance generally, the administration's mishandling of the Durban conference broadened and intensified international scrutiny of America's handling of African American reparations claims.[226]

This international spotlight on the now pending African American reparations lawsuits, against the backdrop of the twenty-year conservative dismantling of the civil rights edifice and the government's current claims of moral authority to wage a preemptive international war on terrorism, place American racial justice on trial as only once before.

B. *Internationalizing Reparations Claims*

There is currently no formal law of reparations.[227] Without a legal road map, reparations proponents around the world are continually charting new territory. Many look to the Swiss Bank/Holocaust Victims and Japanese American internment redress movements for general guidance. In both movements, major lawsuits in American courts failed to "win damages" but nevertheless generated hot publicity that spurred ultimate "political" settlements — by Congress for the Japanese Americans, and by private corporations with the imprimatur of the American and German governments for the Holocaust victims.[228]

1. *Framing the Reparations Class Actions: Mixed Domestic and International Law Claims*

The *Farmer-Paellmann* and Reparations Coordinating Committee's suits build on a strategy employed by recent Holocaust-redress advocates[229] — using international law to help frame reparations

225. *Id.*

226. The Adopted Resolution outlines expectations concerning reparations. States, including the United States, are expected to establish an international compensatory mechanism for victims. One of the mechanisms targets public education about slavery and its connection to racism. The enforcement process, however, does not provide substantial penalties for non-compliance. Rather, states are merely reported to the Committee on the Elimination of Racial Discrimination for problem-solving. If the matter is not resolved, the non-compliant state standing will not be publicly revealed without its express consent. *Report of the World Conference Against Racism, supra* note 206.

227. Sidney L. Harring, *German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development?*, 104 W. VA. L. REV. 393, 410 (2002) [hereinafter Harring, *Herero Nation*].

228. *See supra* Part II.

229. Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 13 (2002) [hereinafter Bazyler, *Holocaust Restitution*].

claims. International human rights law denotes slavery as a crime against humanity and thus a crime against the people of all nations.[230] By internationalizing their claims in this fashion, the suits target American audiences while engaging international communities. One consequence of African American reparations claims on the global stage is the expansion of the traditionally narrow domestic legal paradigm that undermined past reparations suits. A second consequence is the linkage of African American claims to ongoing reparations movements worldwide and their organizing concept of restorative (rather than compensatory) justice.[231]

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230. *See* A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 329-35 (1999) (describing the evolution of customary international law prohibiting slavery and the slave trade). The prohibition of slavery is addressed in the following international human rights instruments: International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 8, 999 U.N.T.S. 171, 175, 6 I.L.M. 368, 371 ("No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labour . . . ."); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 1, 18 U.S.T. 3201, 3204, 266 U.N.T.S. 3, 41 (requiring that states must take measures to end slavery as defined by 1926 Slavery Convention); Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, art. 1, 46 Stat. 2183, 2183, 60 L.N.T.S. 253, 255, *revised by* Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 482, 182 U.N.T.S. 51, 52 (declared intention to suppress slavery); Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 4, at 71, U.N. Doc. A/810 (1948) ("No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."); African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 60 (1982) ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."), *available at* http://www.umn.edu/humanrts/instree/z1afchar.htm; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour."), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm. For convenient access to these and related documents, see U.N. Office of the High Commissioner for Human Rights, International Human Rights Instruments, *at* http://www.unhchr.ch/html/intlinst.htm (last visited Apr. 2, 2003).

231. There is a multitude of continuing reparations movements: (1) former Korean comfort women demand an apology and reparations from the Japanese government, *see* Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 2 (2002); *see also* David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Eschews International Legal Responsibility*, 32 COLUM. J. TRANSNAT'L L. 533 (1995); (2) slave laborers for Japanese industries during World War II seek redress, *see* Bazyler, *Holocaust Restitution*, *supra* note 229, at 29-33; *see also* Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35 (2000); (3) the Herero tribe and the Namas of Namibia seek reparations from Germany, *see* Harring, *Herero Nation supra* note 227; *see also Namibia: Human Rights Body Says Hereros, Namas Should Receive Expropriated Farms*, BBC MONITORING, Sept. 5, 2002, *available at* 2002 WL 26570493; (4) Filipino war veterans seek redress for benefits denied by the U.S. government, *see* Katrice Franklin, *Filipino WWII Veterans Struggle for Recognition*, VIRGINIAN-PILOT & LEDGER STAR, Aug. 12, 2002, at B1; (5) Native Hawaiians claim redress against the state and federal government, *see, e.g.*, Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995); (6) Native Americans seek redress against the U.S.

a. Expanding the Traditional Legal Paradigm. Part II described the traditional-legal-paradigm obstacles to reparations suits.[232] That Part also described how the *Farmer-Paellmann* and Reparations Coordinating Committee's suits attempt to fit their claims (breach of contract, property taking, unjust enrichment) within the constricted legal framework of domestic law and simultaneously expand that framework beyond its established borders.

Farmer-Paellmann and the Reparations Coordinating Committee's suit reach beyond established domestic legal boundaries and into the amorphous, yet potent, realm of international law. The suits do this through their compelling recitation of a history of group terror and exploitation (framing a new collective memory), their resort to innovative group-based remedies (the creation of a historic fact-finding commission and education/health/housing trust funds), and their invocation of human rights norms and rhetoric.[233]

Human rights law is defined by internationally agreed-upon treaties, covenants, conventions, and by customary international law.[234] Professor Jon Van Dyke observes that these laws, or perhaps more precisely legal norms, mandate African American reparations.[235] He cites several instruments as sources for a reparations claim, including the 1948 Universal Declaration of Human Rights[236] and the

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government, *see, e.g.*, Carter D. Frantz, *Getting Back What Was Theirs? The Reparation Mechanisms for the Land Rights Claims of the Maori and the Navajo*, 16 DICK. J. INT'L L. 489 (1998); (7) the Maori in New Zealand claim compensation for land seized, *see* Heidi Kai Guth, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples — Examining the Maori Fisheries Settlement*, 24 U. HAW. L. REV. 179 (2001); (8) the Aborigines in Australia seek an apology and reparations from the government, *see* Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 BERKELEY J. INT'L L. 387 (2002); (9) the Ainu indigenous people in Japan seek reparations, *see* Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419 (2001); and (10) the International Pan-African Movement led by African nongovernmental organizations is moving to take on European nations and multinational corporations that benefited from slavery, *see* Bert Wilkinson, *Rights-Caribbean: Race Meeting Wants Compensation for Slavery*, INTER PRESS SERV., Oct. 4, 2002.

232. *See supra* Part II; *see also* Yamamoto, *Racial Reparations*, *supra* note 4.

233. In the complaint, the clearest example of an international law realm is the inclusion of a human rights violation count. Complaint and Jury Trial Demand at 16, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002).

234. *See generally* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY & PROCESS 13 (2d ed. 1996) (discussing human rights under the UN Charter).

235. Van Dyke, *supra* note 93, at 58.

236. *Id.* at 62 ("Everyone has the right to *an effective remedy* by the competent national tribunals for acts violating fundamental rights granted him by the constitution or by law" (quoting from Article 4 of the Universal Declaration of Human Rights, *supra* note 230) (emphasis added) (internal quotation marks omitted)).

1966 International Covenant on Civil and Political Rights.[237] In addition, he asserts that reparations are appropriate under international law because human rights victims are entitled to an effective remedy and victims' right to compensation for human rights abuses is fundamental.[238]

These general principles of international law avoid some of the traditional common-law-paradigm barriers to African American reparations claims. For instance, in response to the defense that no living African American was enslaved (the individual rights approach), *Farmer-Paellman* offers a group-based claim by asserting that the effects of slavery and Jim Crow segregation continue today and are manifested in the depressed economic conditions of African Americans generally and ongoing racial discrimination in housing, employment, and health care.[239]

By framing slavery as a human rights violation,[240] international human rights law, which lacks formal statutes of limitation, also helps *Farmer-Paellmann* tackle the problem of "stale" claims. Alleging that necessary records were inaccessible and the political climate for reparations was previously unavailing,[241] the complaint implicitly answers "never" to the human rights question, "when is it too late to redress a long-standing wrong that continues?"[242]

b. Human Rights and Restorative Justice. The *Farmer-Paellmann* suit and the forthcoming Reparations Coordinating Committee suit also evoke international human rights by demanding full disclosure and the appointment of independent historic commissions.[243] The investigation and disclosure of human rights abuses is an important facet of international law enforcement.[244] By calling for this type of remedy, the suits aim beyond traditional individual remedies and embrace a broader concept of justice.

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237. *Id.* at 62-63 ("Each State Party to the present Covenant undertakes: (a) To ensure any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity . . . ." (quoting from International Covenant on Civil and Political Rights, art. 2, *supra* note 230 (internal quotation marks omitted) (emphasis added))).

238. *Id.* at 62-65, 68-70. Van Dyke acknowledges that nations inconsistently enforce international law; instead, international law is contextually enforced. *Id.* at 70-72. He asserts, however, that at a minimum, enforcement of international law regarding human rights violations requires a full investigation and disclosure of the abuses. *Id.* at 72.

239. Complaint and Jury Trial Demand at 16, Farmer-Paellman v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002).

240. *Id.*

241. *Id.* at 13-14.

242. Vincene Verdun posed this question. Although he did not refer to international human rights law, the question posed is in line with this discussion. Vincene Verdun, *Righting Old Wrongs*, NAT'L L.J., Aug. 26, 2002, at A9.

243. Complaint and Jury Trial Demand at 15, *Farmer-Paellmann*, No. CV-02-1862.

244. *See* Van Dyke, *supra* note 93, at 72.

In most cases the American legal system treats justice as individualized restitution — compensatory justice.[245] Little or no credence is given to psychological healing or group-based remedies that restore community structures and relationships damaged by the violation.[246] By contrast, restorative justice, pioneered by the South Africa Truth and Reconciliation Commission,[247] entails acknowledgment of the wrongs committed and taking positive steps toward not only the prevention of future abuses but also the healing of communal wounds and repairing the damage to community social structures.[248] Restorative justice informs the Waitangi Claims Tribunal in New Zealand.[249] The tribunal aids in investigations and hears human rights claims of indigenous Maori. The government takes its case findings seriously and acts legislatively on the tribunal's recommendations. The tribunal's work over the years has resulted in some instances in the return of native lands and the rebuilding of Maori communities and culture.[250] By tapping into notions of restorative justice, *Farmer-Paellmann* and the Reparations Coordinating Committee frame reparations not merely as individual compensation but also as a means of repairing deeply scarred race relations.[251]

In sum, the reparations suits will face a steep uphill climb should the federal courts choose to assess the suits' legal claims solely within the narrow traditional individual rights/remedies framework. If the courts do this, however, they must blind themselves to the central aspects of the reparations suits — the enduring social consequences of slavery and legalized segregation. By more broadly internationalizing African American reparations, the suits place both domestic and

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245. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

246. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 52, at 156.

247. *Id.* at 165.

248. *See* DESMOND MPILO TUTU, NO FUTURE WITHOUT FORGIVENESS 54-55 (1999) (discussing the notion of "restorative justice"). Archbishop Tutu writes:

> We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. . . . [This kind of justice] seek[s] to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense. This is a far more personal approach, regarding the offense as something that has happened to persons and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness, and for reconciliation.

249. *See* WAITANGI TRIBUNAL, TURANGI TOWNSHIP REPORT 33 (1995), *available at* http://www.waitangi-tribunal.govt.nz/reports/nicentr/wai084b/chapt02/chapt0227.asp; *see also* Judge Fred McElrea, Partners or Adveraries? [sic], *at* http://www.massey.ac.nz/~wtie/Work/partners_or_adverseries.htm (last visited Apr. 2, 2003).

250. *See* WAITANGI TRIBUNAL, TURANGI TOWNSHIP REMEDIES REPORT: A SUMMARY, *at* http://www.waitangi-tribunal.govt.nz/reports/nicentr/wai84/default.asp (last visited Feb. 20, 2003).

251. *See infra* Part V.

human rights on the American judicial, and public, table. They illuminate what the traditional legal paradigm allows us to ignore.

2. *Human Rights in American Courts: A Political Reparations Strategy*

Framing reparations claims in human rights language offers an appealing way around the limitations of traditional domestic law and an entree into broader notions of restorative justice. The *Farmer-Paellmann* and Reparations Coordinating Committee's suits, however, do not rest entirely or even primarily on international law. American courts have largely refused to enforce international human rights law. For example, in 1998 the Inter-American Commission of Human Rights found that the United States violated international law by executing a person convicted without due process of law.[252] The Commission awarded damages to the decedent's family. The United States administration and the courts, however, refused to enforce or even formally acknowledge the Commission's judgment.[253]

American recalcitrance in supporting the enforcement of human rights is underscored by the United States' recent refusal to submit to the jurisdiction of the International Criminal Court.[254] International human rights norms in American litigation thus remain largely aspirational. In most instances, international law does not provide a scheme for enforcement of human rights or for remedying human rights abuses.[255]

Despite these limitations, framing reparations claims partly in human rights terms may prove an effective strategy — if not a narrow *legal* strategy, then as part of a larger reparations *political* strategy. The post-Durban international spotlight on race, human rights, and reparations raised the stakes for the United States' handling of African American claims. In addition, American courts have begun to entertain a narrowly circumscribed genre of human rights claims that

252. Andrews v. United States, Case No. 11.139, Inter-Am. C.H.R. Report No. 57/96 (1996), *available at* http://www.cidh.oas.org/annualrep/97eng/USA11139.htm.

253. The Commission found that a U.S. court violated international law through its racially discriminatory treatment of William Andrews, an African American man convicted of murder and executed by the state. *See* Yamamoto, *Racial Reparations*, *supra* note 4, at 508-09; *see also Andrews*, Case No. 11.139, Inter-Am. C.H.R. Report No. 57/96. William Andrews was executed despite significant evidence of racial bias; the most blatant was an incident mid-trial in which a juror handed the bailiff a napkin that said, "Hang the Niggers." *See* Andrews v. Shulsen, 485 U.S. 919, 920 (1988) (Marshall, J., dissenting from denial of certiorari).

254. Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002) ("The United States of America has not ratified the treaty establishing a permanent international criminal court, and it is highly unlikely to do so.").

255. Yamamoto, *Racial Reparations*, *supra* note 4, at 508-09.

may indirectly impact the political viability of African American reparations claims.[256]

The Holocaust reparations cases point to the development of a special kind of human rights law in American courts.[257] The seminal case is *Filartiga v. Pena*, which allowed human rights victims who were injured abroad to bring tort suits into American courts against their foreign perpetrators.[258] The Second Circuit Court of Appeals in *Filartiga* found jurisdiction based on the Alien Torts Claims Act ("ATCA").[259] The ATCA authorizes federal district courts to assert jurisdiction over a civil action by an alien for a tort that rises to the level of an international law violation.[260] These torts include politically motivated murder, slavery, rape, mutilation, and torture.[261] For the victims, customary international law and an available forum in the United States are often crucial to justice because the victims' domestic courts may deem the acts of government officials legal under the laws of the government regime where the incidents took place.

Filartiga and the ATCA thus delineate the basic scheme for American judicial enforcement of international legal norms by authorizing suits for human rights torts. Indeed, following *Filartiga*, the victims of politically motivated murder and torture by the Ferdinand Marcos regime in the Philippines successfully employed ATCA section 1350 to ground a successful federal-court class action against Marcos.[262]

In the business realm, Holocaust victims and their families sued Swiss banks under the ATCA to recover victims' monies deposited in the banks before World War II and allegedly misappropriated by the banks.[263] A reparations suit was also recently filed in federal court on behalf of victims of South Africa's apartheid regime against two Swiss banks and Citibank.[264] Based in part on section 1350, the suit seeks

256. *See* Michael J. Jordan, *Inside the Durban Debacle*, SALON, Sept. 7, 2001, *at* http://archive.salon.com/news/feature/2001/09/07/durban/index.html; *supra* note 226.

257. Bazyler, *Holocaust Restitution*, *supra* note 229, at 11, 13.

258. Filartiga v. Pena, 630 F.2d 876 (2d Cir. 1980) (holding that the victims' relatives could sue the perpetrator, a Paraguayan government official, who committed state-sanctioned torture and murder of the victim in Paraguay, in U.S. courts if the perpetrator was found in the U.S.).

259. *Id.* at 878 (citing the Alien Torts Claims Act, 28 U.S.C. § 1350 (2000)).

260. Alien Torts Claims Act, 28 U.S.C. § 1350.

261. *See* NEWMAN & WEISSBRODT, *supra* note 234, at 525-33.

262. *See In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994).

263. *See* Bazyler, *Holocaust Restitution*, *supra* note 229, at 14-17; *supra* note 85.

264. *See supra* note 163 and accompanying text. There are several suits that have been filed, including two in the Southern District of New York, one in the District of New Jersey, and then seven related actions pending in, respectively, the Northern District of California, the Middle District of Florida, the Eastern District of Michigan, the District of New Jersey,

damages on grounds that the defendants' actions contributed to the plaintiffs' injuries by perpetuating the apartheid system. The suit also seeks disgorgement of profits made by the defendants from their business dealings with South Africa's apartheid regime.[265] And last year, the Herero tribe of Namibia filed a federal class-action suit in Washington, D.C. against three German companies, alleging that the companies were responsible for the "enslavement and genocidal destruction" of the Herero tribe in the early twentieth century when Germany colonized Namibia.[266]

Because section 1350 applies only to claims by noncitizens, however, the relevance of this increasing mass of section 1350 suits to African American reparations claims lies less in legal precedents than in political leverage. These human rights cases — entertained, tried, and enforced in American courts — signal the newfound importance of international human rights to reparations claims generally. They also ask: why, under international norms, will American courts hear and in some instances vindicate the reparations claims of people from other countries but will not, so far at least, seriously consider reparations claims of its own citizens — Americans of African ancestry?

The seeming contradiction raised by this question is further highlighted by recent American legal history. For instance, the Japanese American internees' class-action damages suit floundered in the federal courts.[267] Intense public education and organized political lobbying generated in part by the lawsuit and the coram nobis cases, however, pushed Congress in 1988 to award $20,000 reparations to each surviving internee.[268] A contemplated lawsuit by African

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the Eastern District of New York, the Southern District of New York, and the Southern District of Texas. *In re* South African Apartheid Litig., 238 F. Supp. 2d 1379, 1380 n.1 (J.P.M.L. 2002). The suits have been consolidated for pretrial proceedings. *See supra* note 78 and accompanying text. *See also Attorney in Apartheid Lawsuit Heckled by Hostile Crowd*, SABCNEWS.COM, June 17, 2002, *at* http://www.sabcnews.com/south_africa/general/0,1009,36595,00.html.

265. Anthony J. Sebok, *Enforcing Human Rights in American Courts When the Injury Is Indirect: Will the Lawsuit Based on South African Apartheid Prevail?*, FINDLAW (July 15, 2002), *at* http://writ.corporate.findlaw.com/ sebok/20020715.html [hereinafter Sebok, *Enforcing Human Rights*]. The South Africa apartheid suit differs from the others because it includes no claim that the defendant corporations directly violated the plaintiffs' human rights. Rather, the claim is wholly rooted in a claim of indirect injury — dealing with the apartheid regime that violated human rights. This new wrinkle raises questions about how the Alien Tort Claims Act should measure responsibility for indirect injury. *See id.*

266. Anthony J. Sebok, *Slavery, Reparations, and Potential Legal Liability: The Hidden Legal Issue Behind the U.N. Racism Conference*, FINDLAW, Sept. 10, 2001, *at* http://writ.findlaw.com/sebok/20010910.html.

267. The class-action case, *Hohri v. United States*, where internees sought compensation for their losses, failed in the courts. 586 F. Supp. 769 (D.D.C. 1984), *aff'd. in part, rev'd. in part*, 782 F.2d 227 (1986), *vacated by* 482 U.S. 64 (1987), *remanded to* 847 F.2d 779 (1988).

268. *See* Civil Liberties Act of 1988 (Restitution for World War II Internment of Japanese Americans and Aleuts), Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. § 1989 (2000)).

American survivors and descendants of the 1923 Rosewood massacre was never filed because of anticipated legal obstacles. Instead, reparations advocates worked the legislative process to have a Special Master appointed to "try" the survivors' claims and make a nonbinding judgment as to compensation.[269] A political lobbying campaign based on the Special Master's report eventually led the Florida legislature to enact limited reparations legislation.[270] Similarly, in the late 1990s, rather than press their claims in court, African Americans seeking reparations for the 1921 Tulsa race riot lobbied the Oklahoma legislature to establish an investigative commission.[271] The commission's report led to legislatively authorized reparations, which the legislature then declined to fund.[272] Finally, Native Hawaiian reparations claims against the state of Hawaii for misappropriation of native lands held in trust at first succeeded in the trial court and were then partially rejected on appeal.[273] Native Hawaiian groups are now organizing for a legislative resolution.

What emerges from this recent history of judicial treatment of reparations claims is a dialectic. On the one hand, reparations claims in American courts rarely succeed in terms of favorable court judgments (with the exception of section 1350 suits by aliens under international law, which tend to founder too, but at the later stage of judgment collection).[274] On the other hand, every politically successful reparations movement has been galvanized and informed by reparations litigation.

The African American suits add a new and potent dimension to this dialectic. The suits are globalizing African American reparations in the courts of law and public opinion. The lawsuits' role in this

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269. *See Special Master's Final Report from Richard Hixson, Special Master, to Bo Johnson, Speaker of the Florida House of Representatives*, Rosewood Victims v. Florida, *at* http://afgen.com/roswood2.html (March 24, 1994); *see also* MICHAEL D'ORSO, LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD 130 (1996).

270. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 52, at 53-54.

271. ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION (2002) (describing the Tulsa race riot survivors' movement for political reparations).

272. *Id.*; *see also Foul-up? Riot Commission Funds Needed*, TULSA WORLD, June 14, 2000, at 14 ("[T]he commission investigating the Tulsa riot of 1921 does not have the necessary funds to complete its work.").

273. In 1993, the United States apologized for its participation in the illegal overthrow of the Kingdom of Hawai'i. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993); *see also* Yamamoto, *Racial Reparations*, *supra* note 4, at 481.

274. *See* Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.11 (1991) (describing the importance of judgments in § 1350 cases even though "highly mobile defendants and the absence of full faith and credit impair the collectability of judgments").

internationalizing process becomes clear when we view courts not just as the deciders of specific cases but also as the sites of "cultural performances" for the American polity.

3. *Courts and the Cultural Performance: Litigating (in Part) to Reframe the Public Reparations Narrative*

Integrally linked to human rights as political strategy are public education and political organizing. For example, immense governmental and public pressure on Swiss banks triggered their settlement with Holocaust survivors and their families.[275] Indeed, the *Financial Times* observed that "[e]very important breakthrough in the negotiations came soon after threats from US local government officials to impose sanctions."[276] The "stealing from the victims" narrative developed and communicated through the litigation provided the message essential to effective political pressure on the banks.

Similarly, slave laborers from World War II recently achieved a global settlement of their claims against German manufacturers, including Volkswagen, because suits generated tremendous political and economic pressure.[277] The several class-action suits were dismissed by the courts. Yet,

> first and foremost . . . the lawsuits . . . were the fulcrum for all other pressures to open the fiscal coffers of the corporations in Germany. . . . A media blitz to place the issue before the American public and the conscience of the world was accomplished through interviews, articles, briefings, etc. In conjunction with the media blitz was the pressure from elected officials, both at the state and federal level. . . . [B]ills were introduced dealing with the ability of survivors to file lawsuits as well as resolutions urging settlements. The third approach was the national advertising campaign by Jewish groups to shame the German corporations into a settlement.[278]

Indeed, a lawyer who opposed the Holocaust survivors' claims poignantly observed that "companies have learned you don't judge a

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275. Swiss banks traded in assets looted by the Nazis and accepted assets made by Jewish slave labor. *See* Bazyler, *Holocaust Restitution*, *supra* note 229, at 14.

276. *Id.* at 17 & n.25 (citing John Authers & Richard Wolfe, *When Sanctions Work*, FIN. TIMES, Sept. 9, 1998, at 1).

277. *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370 (D.N.J. 2001) (holding that plaintiffs' claims presented non-justiciable political questions, and that the exercise of jurisdiction should be declined in the interest of international comity); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (holding that the issue was a political question which could not be addressed).

278. Barry Robertson, Holocaust Reparations of Slave Labor 8 (May 20, 2002) (unpublished manuscript, on file with authors).

lawsuit by its merits. You judge it by the potential public relations damage."[279]

What are the dynamics of the legal fulcrum? Professor Sidney Harring observes that successful reparation movements have a common history of extensive legal posturing that shapes public opinion and creates the moral climate necessary for reparations.[280] Indeed, the legal process plays a critical role in the "posturing" that shapes public opinion about racial justice generally and reparations specifically.

According to Professor Yamamoto,

> [f]rom one view, courts are simply deciders of particular disputes. . . . From another view, courts are also integral parts of a larger communicative process. Particularly in a setting of hotly contested racial controversies, courts tend to help focus cultural issues, to illuminate institutional power arrangements, and to tell counterstories in ways that assist in the reconstruction of intergroup relationships and aid larger social-political movements.[281]

In these situations, the broader litigation process can be seen as a "cultural performance." In a society, there are specific places where most major aspects of social life simultaneously are presented, contested, and framed. Courts are such places.[282] The interactions among parties, attorneys, judge, court personnel, community, special-interest groups, and the general public through the media and court hearings themselves, contribute to the phrasing of narratives and competing counternarratives for public consumption.[283] The narratives that predominate, like the "stealing from the victims" Swiss banks narrative, in turn form the basis for political action.

For example, the litigation of the *Korematsu* coram nobis and *Hohri* cases, along with the Congressional Commission's investigative report,[284] brought the legal injustice of the Japanese American internment into the national spotlight. In doing so, the litigation, with extensive media coverage, helped dramatically change the narrative of the internment: from an understandable government mistake during wartime to the egregious abuse of government power under the false mantle of national security. This new narrative facilitated the reframe-

279. Owen Pell, a lawyer at White & Case, represented Chase Manhattan against accusations that it illegally blocked accounts held by Jews in wartime France. Cox, *Activists Challenge Corporations*, *supra* note 6.

280. Harring, *Herero Nation*, *supra* note 227, at 18.

281. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 52, at 146.

282. Sally Falk Moore, *Treating Law As Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Courts*, 26 LAW & SOC. L. REV. 11, 43 (1992).

283. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 52, at 146-47.

284. *See* PERSONAL JUSTICE DENIED, *supra* note 47.

ing of Japanese American reparations as a moral imperative and laid the foundation for legislative action.[285]

There are many competing cultural narratives at play in the African American reparations suits filed in different courts in cities across the country. Judging from media commentaries, those narratives include: the endurance of racial disparities between African Americans and whites; the continuing racial discrimination against African Americans; African Americans playing the "victim card"; the inadequacy of affirmative action and the need for reparations; the already level playing field and the immorality of "racial preferences"; the unacknowledged significance of slavery to American history; the need for healing so that American society can move forward; and many others.[286]

In the next Section, we explore one particular cultural narrative: the linkage of African American reparations claims, international human rights, and America's moral standing in the war on terror.

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285. *See* YAMAMOTO ET AL., RACE, RIGHTS & REPARATION, *supra* note 38.

286. *See, e.g.*, Cox, *Activists Challenge Corporations*, *supra* note 6 (central to the reparations campaign is a belief that present-day gaps between whites and blacks are rooted in the past); James Cox, *Reparations Gain Legal, Academic Interest*, USA TODAY, Mar. 25, 2002, at 2B (quoting Jesse Jackson, a reparations proponent, as arguing that "America must acknowledge its roots in the slavery empire, apologize for it . . . and work on some plan to compensate."); Martin C. Evans, *Reparations Expectations; Legal Team Seeks Amends for Slavery*, NEWSDAY, April 24, 2002, at A08 ("[S]upporters of reparations say slavery and the government-sanctioned discrimination that followed created a centuries-long affirmative action for whites, including immigrants."); Ira J. Hadnot, *Bound and Determined; Slave Descendants Want Their Day in Court to Be "Made Whole Again,"* DALLAS MORNING NEWS, Aug. 18, 2002, at 1J (" 'Reparations means to repair or to make whole again. To reclaim our birthright, we must emotionally and historically return to the sites of the original crimes, and to speak on behalf of the victims who perished long ago,' says Dr. Manning Marable, a professor at Columbia University and a member of a team of scholars, lawyers, and civil rights leaders studying the reparations issue."); Hitt, *supra* note 149, at 38 (quoting an attorney for the Reparations Coordinating Committee, Alexander Pires, as arguing, "Slavery's the most unacknowledged story in America's history."); Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at A15 (quoting reparations proponent Charles Ogletree as commenting, "Litigation will show what slavery meant, how it was profitable and how the issue of white privilege is still with us."); Salim Muwakkil, *Hot off the Fringes; Tide May Have Finally Changed on Reparations*, CHI. TRIB., Oct. 30, 2000, at 11 (arguing that affirmative action enshrines a system of preferences, while instead reparations would be a collective social investment in human capital); Salim Muwakkil, *Reparations Gaining Momentum*, CHI. TRIB., July 15, 2002, at 17 (quoting one columnist as saying, "History is what brought us here today. So why is it so hard to accept that one reason, perhaps the main reason, a certain segment of America is poor and dysfunctional is its great-great-grandparents were separated in chains on a slaver's dock?"); Ogletree, *The Case for Reparations*, *supra* note 77, at 9 (noting the enduring effects of slavery and racial discrimination as evidenced by the racial disparities in access to social goods); Brent Staples, *Editorial Observer: How Slavery Fueled Business in the North*, N.Y. TIMES, July 24, 2000, at A18 (commenting that "More than a few modern fortunes rest on the suffering of human beings who once accounted for a large portion of American wealth and lived in chains here for 250 years."); Tara Young, *Slavery Reparations Federal Suit Filed; 200 La. Residents Make Claim*, TIMES-PICAYUNE (New Orleans), Sept. 4, 2002, at 1 (quoting Barbara Leonard, a Louisiana plaintiff, saying, "You can't hide the wound. You can't heal until you have worked on the wound.").

C. *Reparations and the War on Terror*

As discussed in Part II, continuing racial inequalities coupled with the sustained attacks on civil rights and affirmative action give traction domestically to the current African American reparations movement.[287] After the United Nations Durban Racism Conference and government responses to 9/11, African American reparations claims also resonate internationally.

1. *The Moral High Ground: Recognizing Slavery as a Form of Terrorism*

The African American reparations movement, like the *Farmer-Paellmann* complaint and the forthcoming Reparations Coordinating Committee suit, grounds reparations claims on a history of racial terror and ensuing segregation and discrimination. At the same time, the current movement, with its supporting lawsuits, bears new rhetoric, rests partially on new claims and targets a far wider audience.[288]

To generalize broadly, the earlier movements tied reparations claims to the idea of equality rooted in American law and aimed at domestic audiences — American legislators and judges and the mainstream public. The current movement internationalizes African American redress. It does so explicitly by asserting international human rights claims and by linking African American redress to reparations efforts around the world.[289] It does so implicitly by broadly articulating and staunchly pressing internationalized African American reparations claims in multiple forums at the same time the United States is struggling for the moral high ground in its preemptive war on terrorism.

Indeed, a wide range of civil rights organizations have charged that the John Ashcroft-led Justice Department is putting itself above the law domestically through its broad-scale civil liberties abuses under the mantle of national security.[290] Those alleged abuses include: racial

287. Westley, *supra* note 92.

288. *See supra* Section IV.B.

289. *See infra* Section IV.C.

290. Adam Clymer, *Threats and Responses: Domestic Security; Justice Dept. Draft on Wider Powers Draws Quick Criticism*, N.Y. TIMES, Feb. 8, 2003, at A7 (discussing criticism of the Justice Department's confidential draft legislation to increase law enforcement's powers beyond those already articulated in the USA Patriot Act); Jose Latour, *More Troubling Ashcroft-isms*, IMMIGRATION DAILY, Feb. 5, 2003, *at* http://www.ilw.com/lawyers/colum_article/articles/ 2003,0206-latour.shtm (Republican immigration attorney criticizing Attorney General Ashcroft's directive to federal agencies to reject outright requests for documents under the Freedom of Information Act if there is any legal basis for doing so and assuring them that the Justice Department would defend them in court if challenged).

and religious harassment under the guise of security investigations;[291] incarceration of citizens and immigrants indefinitely without charges, hearing, or access to counsel;[292] "special registration" of immigrants from largely Arab and Muslim countries;[293] indefinite detentions of citizens deemed by the Justice Department to be "enemy combatants," with no right of judicial review;[294] and state and local police crackdowns on lawful protestors of the government's war policies.[295]

The Bush administration declared that its war on terror aims to rid the world of evil.[296] The war, the administration also said, is a fight for democracy from the "highest moral plane."[297] Yet, many in the United States and leaders from other countries remain skeptical at best. Mounting protests across America,[298] Europe,[299] and the Middle East[300] charge that while the United States should defend its people and institutions, the administration's expanding war is driven by larger political goals — achieving American hegemony worldwide.[301] Those critics

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291. Susan M. Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 331-37 (2002) (discussing mass arrests, detentions, secret hearings, and deportation of primarily Muslim and Middle Eastern men immediately after September 11); Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES, Oct. 27, 2002 (Magazine), at 50 (describing Hady Hassan Omar's detention after September 11 in which he was held by the Justice Department although no formal charges were filed against him, forced to eat pork, ridiculed by government employees and mentally tortured until he was released 73 days later).

292. *See* Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

293. Editorial, *Fiasco in the Making*, WASH. POST, Jan. 10, 2003, at A20 (discussing special registration procedures and mass arrests of Middle Eastern and Muslim men, in violation of the Immigration and Naturalization Act and the Fourth and Fifth Amendments of the Constitution).

294. *See generally Hamdi*, 296 F.3d 278 (4th Cir. 2002) (explaining government's decision to try US citizens labeled "enemy combatants" in military trials); *Padilla*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (same).

295. *See* Solomon, *supra* note 64; *see also* Pope, *supra* note 64; Editorial, *The War on Civil Liberties*, N.Y. TIMES, Sept 10, 2002, at A24; Ramasastry, *supra* note 64.

296. News Release, White House Office of the Press Sec'y, President Building Worldwide Campaign Against Terrorism: Remarks by President Bush and President Megawati of Indonesia in a Photo Opportunity (Sept. 19, 2001) ("[T]he war against terrorism is not a war against Muslims, nor is it a war against Arabs. It's a war against evil people who conduct crimes against innocent people."), *available at* http://www.whitehouse.gov/news/ releases/2001/09/print/20010919-1.html.

297. *See supra* Part I.

298. *See* Ana Maria Echeverria, *Thousands Protest America's Iraq Policy*, IAFRICA.COM, Oct. 7, 2002, *at* http://www.iafrica.com/news/worldnews/173108.htm.

299. *See Protestors Highlight "War Against Muslims,"* BBC NEWS, July 20, 2002, *at* http://news.bbc.co.uk/2/hi/uk_news/england/2139955.stm.

300. *Id.*

301. Jay Bookman, *Bush's Real Goal in Iraq*, ATLANTA J.-CONST., Sept. 29, 2002, at F1 (describing how key Bush administration leaders generated the blueprint for the "Project for the New American Century" before September 11 with a war with Iraq "intended to mark

also assert that an expansive war threatens world stability, undermines human rights, and ultimately generates resistance and backlash against the United States and democracy.[302]

In this setting, the United States' own civil and human rights practices grow in importance. By justifying its military actions abroad as preemptive attacks on terrorism, America invites scrutiny of its own history of government-sanctioned terror within its borders. If terrorism is the use of violence or threat of violence to sow panic to achieve political ends,[303] then slavery and Jim Crow segregation, backed by law and enforced by whippings, lynchings, and murder, were part of a racial system that terrorized a segment of the American polity for economic and political ends.

As the *Farmer-Paellmann* complaint describes, slavery "fueled the prosperity" of America.[304] Forced, unpaid labor supported southern agriculture, eastern banking, northern industries, and westward expansion, as well as private universities.[305] Human bondage and terror maintained an American racial hierarchy that privileged whites economically and socially at the expense of the freedom, dignity, and economic well-being of African Americans.[306] Two-hundred years of slavery, eighty years of legalized segregation backed by violence, and forty more years of varying forms of invidious and institutionalized discrimination have enduring consequences: among them, the average net worth of an African American family in 1999 was $7,000; the average net worth of a white family was twelve times greater, over $84,400.[307]

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the official emergence of the United States as a full-fledged global empire, seizing sole responsibility and authority as planetary policeman.").

302. *See, e.g.*, Albert R. Hunt, *U.S. Can't Go It Alone*, WALL ST. J., Apr. 25, 2002, at A19 ("Throughout Europe, surveys show critics of George Bush and American foreign policy outnumber supporters. The rift may be growing.").

303. Walter Laqueur, *Left, Right and Beyond: The Changing Face of Terror*, *in* HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR (James F. Hoge, Jr. & Gideon Rose eds., 2001), *quoted in* Todd S. Purdum, *What Do You Mean, "Terrorist"?*, N.Y. TIMES, Apr. 7, 2002, § 4, at 1.

304. Complaint and Jury Trial Demand at 2-4, Farmer-Paellman v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002).

305. *Id.* at 4 ("Slavery fueled the prosperity of the young nation. From 1790 to 1860 alone, the U.S. economy reaped the benefits of as much as $40 million in unpaid labor.").

306. *See generally* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

307. *See* Salim Muwakkil, Editorial, *A Common Enemy*, IN THESE TIMES, May 29, 2000, at 2; *see also* Dalton Conley, *The Black-White Wealth Gap: Net Worth, More than Any Other Statistic, Shows the Depth of Racial Inequality*, NATION, Mar. 26, 2001, at 20 ("[W]hile African-Americans do earn less than whites, asset gaps remain large even when we compare black and white families at the same income levels. For instance, at the lower end of the economic spectrum (incomes less than $15,000 per year), the median African-American family has a net worth of zero, while the equivalent white family's net worth is $10,000."). For statistics from previous years, see, for example, *Setting the Record Straight on the State of*

In short, while focusing on domestic relief to materially benefit African Americans in need, the new face of African American reparations is globalized. This internationalization of reparations places the United States amid other nations searching for peace through justice in the face of unredressed claims of historic terror and injustice.

2. *The Cold War and the War on Terror: Interest Convergence*

This internationalization of reparations is also generating an increasingly potent American self-interest in African American redress. Broadly speaking, this self-interest can be framed as two strong observations emerging from the current African American redress movement and the reparations suits, and from another epochal race trial fifty years earlier, *Brown v. Board of Education*[308] (as well as the original *Korematsu* litigation ten years before *Brown*).

The first observation is that, in the short run, the United States will lack unfettered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own historic government-sponsored terrorizing of a significant segment of its populace. The second observation is that, in the long term, unity and peace within its borders and the United States' international standing will be jeopardized by the government's exercise of military and economic power for larger nondefensive political ends in a manner that subverts civil liberties at home and human rights abroad.

Professor Mary Dudziak describes a political climate during *Brown v. Board of Education* that in some important respects parallels the climate of today's war on terror.[309] In the early 1950s, in the thick of the Cold War, the United States waged its war against communism by promoting democracy worldwide while repressing civil rights (racial segregation) and liberties (McCarthyism) at home.[310] Under the glare

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Black Inequality in the United States, J. BLACKS IN HIGHER EDUC., Autumn 1998, at 46-47 (reporting that the median net worth of black families is $4,418 while the median net worth of white families is $45,740). *See also* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 201 tbl.A5.8 (1995) (indicating that African American families own $17,375 in net worth and their white counterparts own $56,046).

308. 347 U.S. 483 (1954).

309. *See* DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 9; *see also* Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) [hereinafter Dudziak, *Desegregation as a Cold War Imperative*].

310. *See* Mari J. Matsuda, *McCarthyism, the Internment and the Contradictions of Power*, 40 B.C. L. REV. 9 (1998) ("The massive repression known as McCarthyism, like the internment, was a repudiation of Constitutional values in the name of preserving the republic. This was at once an old story and a new one, for the repression of the McCarthy period occurred while a newly acknowledged commitment to racial equality was gaining ascendancy.").

of global media, state-sponsored systemic oppression of African Americans raised the hard question of whether American democracy inhibited, rather than promoted, freedom and equality. International critics of America's global attempt to spread democracy seized on the United States' own civil rights and human rights record.[311]

To elevate the struggling Civil Rights movement, the National Association for the Advancement of Colored People ("NAACP") also strategically linked America's fight against world communism with racial injustice at home by predicating genuine democracy on racial equality.[312] The Justice Department framed its amicus brief in *Brown* in just these terms: "[t]he United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man."[313]

Indeed, in the face of heightening criticism on the world stage, the United States needed to characterize democracy as the morally superior, "most civilized" form of governance. To do so, America had to deal with what at least one group called government-sanctioned terror. In 1951 an African American organization, the Civil Rights Congress, filed with the United Nations a pathbreaking human rights petition titled "We Charge Genocide."[314] The petition charged the United States with widespread government-sanctioned terror that amounted to "genocide" of the African American race.[315] Filed in the early stages of the Cold War, the petition's domestic genocide claims linked America's moral authority to wage war abroad in the interest of democracy with its treatment of African Americans at home. As one observer noted: "[T]he test of the basic goals of a foreign policy is inherent in the manner in which a government treats its own nationals and is not to be found in the lofty platitudes that pervade so many treaties or constitutions. The essence lies not in the form, but rather, in the substance."[316]

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311. International critics included the Soviet Union, China, the Philippines, Ceylon, Fiji, and Holland. *See* DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 9, at 37-45.

312. Dudziak, *Desegregation as a Cold War Imperative*, *supra* note 309, at 76.

313. *Id.* at 65 (citing Brief for Amicus Curiae United States at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1, 8)).

314. *See* CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (William L. Patterson ed., Int'l Pub. 1970) (1951).

315. *See* Sharon Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000).

316. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 9, at 64 (citing DAVID CUSHMAN COYLE, THE UNITED NATIONS AND HOW IT WORKS 84-85 (rev. ed. 1969)); CIVIL RIGHTS CONGRESS, *supra* note 314, at 3. In December 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide and in 1951, the Civil Rights Congress filed a petition in the U.N. charging that the U.S. govern-

Over the next several years American officials responsible for international affairs mounted a campaign to clean up America's tarnished image abroad, targeting among others the Supreme Court.[317] As Professor Dudziak's extensive historical research reveals, the government's position in *Brown* was not driven primarily by a commitment to equality or fairness but by Cold War imperatives.[318] Professor Richard Delgado aptly summarizes that research: "[d]ocument after document and [press] release after release inexorably converge on the same point — the United States needed to do something large-scale, public and spectacular to reverse its declining fortunes on the world stage."[319] And the Supreme Court responded. In 1954, the Court unanimously decided *Brown*, overruling *Plessy*'s separate-but-equal doctrine and outlawing overt state-sponsored segregation.

Seen in this light, *Brown* is at least partially explainable by Derrick Bell's interest-convergence thesis — that "gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition."[320] Bell described this interest-convergence phenomenon as a dilemma. On the one hand, advancing whites' self-interest — in improved international standing to promote democracy, for example — might result in civil rights reforms that meant significant material gains for African Americans — as happened in *Brown*. On the other hand, white or government self-interest might also favor continuing an overall racial hierarchy so that reforms deliver far less than publicly promised — as also happened in *Brown*.[321] Bell's interest-convergence thesis, or dilemma, triggers important inquiries into the possible link-

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ment violated the Genocide Convention by committing genocide against African Americans. *Id.* at 31, 43

317. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 9, at 90-100.

318. Dudziak quotes a memorandum, among many, from Acting Secretary of State Dean Acheson to the chair of the Fair Employment Services Practices Commission: "The existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. . . . Frequently we find it next to impossible to [respond] to our critics in other countries." *Id.* at 80.

319. Delgado, *supra* note 70, at 373 (reviewing Mary Dudziak's research and elaborating on Derrick Bell's interest-convergence thesis).

320. *Id.* at 371 (describing Bell's interest-convergence thesis); *see also* Bell, *supra* note 8.

321. Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1 (1991) (describing the concept of formal equality, which *Brown* approved, and ways that it allows many less-than-overt forms of discrimination to slip under the antidiscrimination law radar).

age of African American reparations claims to human rights and the war on terror.[322]

The Cold War and the war on terror share rhetoric about America fighting for the survival of democracy. During both wars, international as well as domestic organizations raised sharp concerns about civil rights and challenged American goals and moral standing. *Brown* followed by a mere decade another epochal race trial — *Korematsu*. Legal observers had labeled *Korematsu* a civil liberties disaster.[323] The Supreme Court in *Brown* thus faced not only intense international criticism of the United States' harsh subjugation of African Americans, but also growing condemnation of its racist incarceration of Japanese Americans under the mantle of national security.[324] Two key dimensions of American racial justice were therefore placed on public trial: America's racial laws and practices generally and the government's willingness to misuse "national security" as the cover for major civil liberties violations during times of national fear and stress.

Brown's recognition of African American civil rights during the Cold War therefore served dual purposes. It responded to domestic and international criticism of domestic racial laws and policies.[325] It also appeared to quell worries about America's willingness to trample civil rights while fighting a war for democracy.

The coinciding epochal retrials of African American reparations for slavery and *Korematsu*'s national security/civil liberties tension are heightening post-Durban worldwide scrutiny of American racial justice. American self-interest in these trials, of course, will be affected by myriad shifting, oftentimes unpredictable, political events. The open-ended question today, therefore, is this: How will the government's handling of African American reparations claims influence and be influenced by its apparent attempt to resurrect "old *Korematsu*" as well as the increasing domestic and international peace protests and

322. For an in-depth analysis of the interest-convergence thesis in connection with African American redress and the war on terrorism, see Van Luong, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 31 U. HAW. L. REV. (forthcoming 2003).

323. *See* JACOBUS TEN BROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION (1954); MORTON GRODZINS, AMERICANS BETRAYED (1949); Nanette Dembitz, *Racial Discrimination and Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175 (1945); Eugene Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945).

324. *See* sources cited *supra* note 323.

325. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes — Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371-75 (2002) (reviewing DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 9) (citing Dudziak's research and discussing international reactions to racial violence and lynching in the United States during the immediate postwar period as well as the U.S. government's initial reaction to unfavorable press worldwide).

growing human rights and civil liberties criticism of the manner in which the United States is pursuing its war on terror?

3. *Reparations Principles*

At this juncture, a caveat is in order. The African American reparations movement, particularly when viewed through an interest-convergence lens, should not be misunderstood as lending moral credence to the war on terror. Rather, the reparations suits and movement, at this stage in their evolution, can best be viewed as teasing out preliminary reparations lessons-learned in two realms.

The first realm is reparations strategy. If, as the interest-convergence thesis predicts, reparations will be conferred only when mainstream American political and economic interests are also served, then African American reparations proponents need a political and legal strategy that primarily serves African Americans but also delivers a vision of broad-scale domestic benefits. Japanese Americans, for instance, achieved redress only after the Reagan administration shifted positions on reparations to bolster its moral authority on human rights as the United States intensified the end stages of its war against world communism.[326]

One salient dimension of this vision is the connection between the United States' moral authority to fight its war on terror and America's response to African American redress claims for state-sponsored terror at home, and the linkage of both to what the *Korematsu* coram nobis litigation and Japanese American redress highlighted — the fundamental importance of protecting civil rights and liberties precisely when America is engaged in an international war for democracy. This vision provides a strategic interest-convergence roadmap for public education, political organizing, and lobbying about the significance of reparations both for African Americans most in need and for American society more generally.

The second realm of lessons-learned encompasses reparations principles. If African Americans, or any group, were to achieve reparations in exchange for touting America's moral authority to fight a war that actually heightens human suffering and derogates the civil and human rights of others, then in that instance reparations would be a sell-out — receiving reparations in exchange for silence or, worse, complicity. Indeed, Professor Yamamoto has cautioned Japanese Americans that their legacy of reparations remains "unfinished business"[327] — they must support the civil and human rights struggles of others, or forfeit part of the moral foundation of Japanese American

326. *See* Yamamoto, *Friend, or Foe or Something Else*, *supra* note 30.

327. Yamamoto, *Beyond Redress*, *supra* note 53.

reparations. No one is suggesting that African Americans or Japanese Americans are doing this. But in theory the possibility remains.

This possibility speaks to the need for reparations principles. In light of the "Age of Reparations," the time is ripe for broadly articulating and justifying those principles. That encompassing task is beyond the scope of this Essay. For now we identify for further discussion one proffered reparations principle relevant to African American redress: both in redressing its own injustices and in its present-day treatment of citizens and immigrants during times of national stress and fears over security, America's long-term interests are best served when it pays careful heed to domestic civil rights and international human rights.

As Professor Harring observes, the purpose of reparations is not to attempt to make victims whole, for that is impossible.[328] Instead, through reparations, a government commits itself and its people to civil and human rights by acknowledging responsibility for transgressions, by making amends, and by preventing future abuses under the false or merely expedient guise of necessity.[329] In following this principle a government, such as the United States, need not forgo strong defensive measures to protect freedom and equality. It means that in taking those measures, however, the government and its people must take special care to preserve those values on the ground, where they count most. Only then can the government claim, in Colin Powell's words, the "high moral ground."[330]

V. CONCLUDING THOUGHTS: REPARATIONS AS "REPAIR"

The African American reparations claims and their increasingly internationalized framing signal the retrying of who "we" are as a people — in our own eyes and, as the government fights the war on terror, in the eyes of the world communities as they struggle to rectify historic colonial and wartime injustices. Indeed, pressed by the rising tide of public criticism about his administration's apparent disdain for civil liberties, President Bush implicitly acknowledged the linkage of the government's moral authority to wage a war on terror to its approach to civil rights in his pre-9/11 anniversary news conference statement that "in order to reject the evil done to America on September the 11th, we must reject bigotry in all its forms."[331]

328. Harring, *Herero Nation*, *supra* note 227, at 416.

329. Hunt, *supra* note 302 (citing to John Nye's term of "soft power").

330. DeYoung, *supra* note 2, at A20 (quoting Colin Powell).

331. News Release, White House Office of the Press Sec'y, President Bush Holds Round Table with Arab- and Muslim-American Leaders, *supra* note 121.

To reject bigotry in all its forms, we submit, the United States must repair the lasting wounds of historic American terror. Especially at a time when conservative politicians, lawyers, and judges have largely succeeded in dismantling the 1960s civil rights edifice, rejecting bigotry means reparation not only in the abstract but also as it is experienced. That kind of reparation, particularly when long overdue, offers the nation its best, if not only, prospect of ascending to the highest moral plane.

Reparations as "repair" aims for more than temporary monetary salve for those hurting. It is more than just compensation for past debts. Rather, it is a vehicle for groups in conflict to rebuild their relationships through attitudinal changes and institutional restructuring.[332] Avoiding the traps of the individual-rights and -remedies paradigm, reparations as repair is potentially transformative. Grounded on group rights and responsibilities and providing tangible benefits to those wronged by those in power, this repair paradigm targets substantive barriers to liberty and equality. Reparations as repair is also symbolic — it condemns exploitation and adopts a vision of a more just world.[333]

This repair paradigm is rooted in the international jurisprudential idea of restorative, rather than compensatory, justice.[334] Restorative justice entails acknowledging the wrongs committed and taking positive steps toward not only the prevention of future abuses, but also the healing of communal wounds and the repairing of damage to community social structures.[335]

Restorative justice is reflective of the African notion of "*ubuntu*" — the notion of interconnectedness and the idea that no one can be healthy when the community is sick.[336] Characterizing justice as community restoration, particularly the rebuilding of the community to include those harmed or formerly excluded,[337] *ubuntu* says "I am human only because you are human. If I undermine your humanity, I

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332. Yamamoto, *Racial Reparations*, *supra* note 4, at 521. *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998) (assessing a range of societal responses to historic group-based injustice).

333. Yamamoto, *Racial Reparations*, *supra* note 4, at 519-20 (explaining that coupled with an acknowledgment and an apology, reparations as repair is transformative).

334. Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 52 (1997) (quoting Archbishop Desmond Tutu, head of South Africa's Truth and Reconciliation Commission).

335. *See id.* at 53 (suggesting that restorative justice entails an inquiry and action in four areas — acknowledgment, affirmative efforts, material changes, and reframing).

336. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 52, at 165 (describing *ubuntu* as the notion that "people are people through other people"). *Ubuntu* "is far more restorative [than retributive] — not so much to punish as to redress or restore a balance . . . [it is] restorative of the dignity of the people as part of a common humanity." *Id.*

337. *Id.*

dehumanize myself."[338] In other words, *ubuntu* shapes healing efforts through notions of co-responsibility, interdependence, and enjoyment of rights by all.[339] Ultimately, "reparations as repair," based on restorative justice, aims to heal social wounds by bringing back into the community those wrongly excluded, essentially healing through the restoration of the polity.[340]

Cast in this international light, the pending and impending African American reparation suits, and the political movement supporting them, may well emerge as an epochal American race trial. First, they articulate a moral case for African American reparations in compelling justice terms — terms the American public has yet to fully engage and cannot ignore. They speak cogently not only of the human horrors of slavery and the lasting economic benefits derived by whites in America, but also of the continuing social and economic harms to African Americans. Second, with the backlash against affirmative action and ameliorative race-based programs, the reparations movement asks the United States to make good, rather than renege again, on its second promise of a genuine Reconstruction.[341]

Third, the multifaceted political and economic African American redress movement targets American government and business not just for a debt due but also for redress for the long-term systemic terrorizing of Americans of African descent. It demands that the United States rectify its own historic injustices at a time when it attempts to claim the moral high ground through the war on terror under the dual mantles of democracy and human rights.

Finally, in addition to seeking to improve the material living conditions of African Americans most in need, the reparations movement aims to repair the lasting harms to American society itself.[342] "Underlying this movement is a unifying principle we can't continue to ignore. This is about making America better, by helping the truly disadvantaged."[343] In attempting in part to *repair-the-nation*, the African American reparations suits place American racial justice on trial — again. As with Sisyphus, that this trial recurs is not reason for despair.

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338. *Id.* at 256.

339. *Id.* at 165.

340. This repair paradigm of reparations redirects attention away from individual (recognized by law) and legal remedies (monetary compensation). Instead, it focuses on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease — a breach in the polity. Yamamoto, *Racial Reparations*, *supra* note 4, at 522.

341. *See supra* Part III.

342. ROBINSON, *supra* note 80.

343. Charles J. Ogletree, Jr., *The Case for Reparations*, *supra* note 77, at 7.

What matters now is how our government and we, its people, engage the struggle.